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Secularism and the Supreme Court

George W. Dent, Jr.^{*}

"God is dead."

—*Nietzsche*[†]

"The third day He rose again from the dead."

—*The Apostle's Creed*^{††}

Beginning with the Enlightenment in the eighteenth century, religion was widely denounced by intellectuals as superstition, the enemy of reason and progress. They fought to extirpate religion from public life and predicted that, as social conditions improved through scientific progress and the spread of freedom, democracy, and education, religion would wither away. This secularism¹ triumphed in the Supreme Court in the 1960s and transformed the Court's construction of the religion clauses of the First Amendment of the Constitution.² Defying the intellectuals' prophecy, however, secularism declined. Americans remain as religious now as in the past, and more vibrant sects (often labeled "fundamentalist") are growing at the expense of more pallid, mainstream sects. Many intellectuals now realize the social significance of religion.

In the Supreme Court, however, secularism remains strong. Legal scholars have long noted the Court's dim view of religion, but they have never explored either the rise of secularism or its

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[†] FRIEDRICH NIETZSCHE, *THE GAY SCIENCE* 167 (Walter Kaufmann trans., Random House 1974) (1882).

^{††} See also 1 *Corinthians* 15:4.

1. "Secularism" is "indifference to or rejection or exclusion of religion and religious considerations." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1056 (10th ed. 1993).

2. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U.S. CONST. amend. I.

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anomalous persistence in the Court despite the revival of religion elsewhere. They have ignored the significance of these developments for constitutional jurisprudence and for the role of religion in public discourse.

This Article attempts to rectify these oversights. It traces the rise of secularism (Part I) and its subsequent retreat during the resurgence of religion (Part II). Part III begins by examining the rise of secularism in the Supreme Court in the context of the general dominance of secularism among intellectuals. It then considers why secularism persists in the Supreme Court despite its demise elsewhere. Finally, Part III also discusses how a decent respect for religion would influence constitutional jurisprudence and argues that this influence would benefit society.

I. THE RISE OF SECULARISM

A. *The Demise of Ecclesiastic Dominance*

There have always been skeptics who question religion. Thus, the Book of Psalms states: "The fool hath said in his heart, There is no God."³ The Middle Ages, however, was an age of faith in which religious dissent (including atheism) was weak and easily suppressed by the powerful Church.⁴ The Protestant Reformation and the rise of nation-states with potent rulers eager to curb the rival power of the Church unleashed religious dissent. Sectarian warfare made religion, a traditional source of stability, a source of strife. The corruption and wealth of the Church belied its moral and spiritual missions, making it appear as just another selfish, oppressive worldly power. Science refuted several beliefs endorsed by the Church. More disturbing, the scientific method of empiricism challenged the Church's reliance on faith. Expanding literacy and availability of books after the invention of the printing press broke the monopoly of the parish priest on the information and opinions available to the people. Thus with the Reformation, the challenge to established religion first became robust, widespread, and public.

3. *Psalms* 14:1.

4. The "Church" is now commonly referred to as the Catholic Church.

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The Church bungled this challenge. Rather than admit its faults, correct them, and adjust to new knowledge and social conditions, it redoubled its resistance to change and dissent. The Counter Reformation recovered much of Catholicism's lost territory, but in the competition for people's minds it largely failed; the Church's suppression of heterodoxy merely made it an easier target for criticism. Where Protestant theocracies seized power, as in England under Cromwell, they generally committed the same mistakes. These blunders tarnished respect not just for particular denominations but for all religion.⁵

Secularism is not a single, consistent critique of religion but encompasses many otherwise antagonistic ideologies, like capitalism and Marxism. On the other hand, the struggle between religion and secularism often divides people who agree on most other issues. For example, while Marxists and most other socialists were secularists, a minority of socialists grounded their beliefs on religious faith. Many Enlightenment thinkers deemed religion incompatible with human freedom, but for the philosophers of the Protestant Enlightenment, religion furnished the foundation for their arguments for liberty.⁶ The latter view was especially strong in America.⁷ Because of its varied strands, secularism is not easy to describe; most generalizations about it must be hedged with exceptions. With this caveat in mind, however, it is possible to paint a rough portrait of the elements of secularism.

B. The Challenge of Science and Reason

Christianity held a dual vision of human nature: man is steeped in sin⁸ but is also created "in the image of God"⁹ and or-

5. See WILL & ARIEL DURANT, *THE AGE OF REASON BEGINS* 571 (1961) (referring to "a skepticism encouraged by the coarseness of religious polemics, the brutality of the war, and the cruelties of belief"); see also JOHN HALE, *THE CIVILIZATION OF EUROPE IN THE RENAISSANCE* 462 (1993) (referring to "the jumpiness and inflexibility within the tautened religious convictions of both Protestants and Catholics").

6. See Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 153-66 (1991) Smith "discusses the religious justification and argues for the central importance of that justification in generating a commitment of religious freedom in the founding period." *Id.* at 152.

7. See *id.* at 156-66.

8. See *Romans* 3:23 ("For all have sinned.").

9. *Genesis* 1:27.

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dained by Him to rule the Earth, the fixed center of the universe. Science refuted much of this vision. It showed the Earth is just one of many planets orbiting the sun, which is one of billions of stars floating in a vast universe. Darwin showed that man did not appear on Earth fully formed but evolved from other animals. The evolutionary principle of "survival of the fittest"¹⁰ also subverted Christian commandments to care for and help the weak.

Although the Church usually condoned progress in applied science and technology, it often opposed basic scientific research: "Theology frowned on any attempt at reaching into the secrets of nature, an unlawful invasion of the sacred womb of the Great Mother."¹¹ Science belittled religion by demystifying and taming nature. Scientists unraveled the enigmas of the physical world, medicine conquered diseases, and technology accomplished previously impossible tasks. Religion no longer seemed necessary to explicate nature, to ward off evil spirits, or to obtain divine aid to man's puny powers.

More generally, secularists purported to rely on fact and reason alone. They objected to religion in public debate because it rests on faith and cannot be tested by fact or reason.¹² Where secularism dominated, theists often felt compelled to disguise their faith and frame their ideas in secular terms.¹³ One could endorse human rights, for instance, but not because man is created in God's image or because liberty is a gift from God. Secularists deemed religion not a source of wisdom but a mistake to be analyzed and corrected. Marx called religion a myth that serves the ruling class by duping workers to accept

10. The phrase was coined by Herbert Spencer. See 1 HERBERT SPENCER, PRINCIPLES OF BIOLOGY pt. 3, ch. 12, § 164 (1866). It was adopted by Darwin. See CHARLES DARWIN, THE ORIGIN OF SPECIES BY MEANS OF NATURAL SELECTION 63 (6th ed. 1872).

11. FRIEDRICH HEER, THE MEDIEVAL WORLD: EUROPE 1100-1350, at 240 (Janet Sondheimer trans., 1961).

12. Many secularists still oppose the basing of moral claims on religion. See RICHARD RORTY, CONSEQUENCES OF PRAGMATISM at xiv, xxxviii-xliv, 32-33, 97-98, 165 (1982); RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 138, 177-78, 190-91, 281, 308 (1979); Bruce Ackerman, *Why Dialogue?*, 86 J. PHIL. 5, 16-18 (1989); Thomas Nagel, *Moral Conflict and Political Legitimacy*, 16 PHIL. & PUB. AFF. 215, 218 (1987).

13. See authorities cited in Smith, *supra* note 6, at 173 (describing exclusion of religion from academic debate).

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exploitation.¹⁴ Freud considered religion a mass “obsessional neurosis” springing from emotional conflicts about sex and the primal father.¹⁵

Secularists also condemned tradition, custom, convention, and habit as mere prejudice because they do not rest on fact and reason; they buttress the *status quo* and so hinder progress.¹⁶ The Napoleonic Code abolished the common law principle of *stare decisis*—deciding cases on the basis of precedent—on the theory that cases should be resolved by statutes and reason only, not tradition.¹⁷ As Holmes put it: “It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.”¹⁸ The attack on tradition, which largely succeeded,¹⁹ wounded religion, which follows rituals based on custom and generally supports the established order, of which tradition is typically an important part. Most people adhere to the faith of their family or tribe. Thus religion elevates tradition over independent reason and encourages acceptance rather than skeptical questioning of authority and the *status quo*.

Insistence on fact and reason also bruised religion by downgrading moral philosophy. Unlike claims of the natural and social sciences, moral claims cannot be proved empirically. This did not necessarily make moral questions less important, but

14. See KARL MARX, *CRITIQUE OF HEGEL'S 'PHILOSOPHY OF RIGHT'* 131 (Annette Jolin trans. & Joseph O'Malley ed. & trans., Cambridge Univ. Press 1970) (1844).

15. See IRVING KRISTOL, *God and the Psychoanalysts*, in *NEO-CONSERVATISM: THE AUTOBIOGRAPHY OF AN IDEA* 389, 399–401 (1995).

16. The Enlightenment philosopher Baron d'Holbach decried anyone who “clings to blind opinions imbibed in his infancy” and “the consequent prejudices that warp his mind.” He encouraged each person to “think for himself.” 1 PAUL HENRY THIERY & BARON D'HOLBACH, *THE SYSTEM OF NATURE* at v–vi (Garland Publ'g 1984) (1820). Influential American pragmatist John Dewey also criticized tradition and precedent. See Anthony E. Cook, *The Death of God in American Pragmatism and Realism: Resurrecting the Value of Love in Contemporary Jurisprudence*, 82 GEO. L.J. 1431, 1445–47 (1994).

17. See *THE CODE NAPOLEON AND THE COMMON-LAW WORLD* 65 (Bernard Schwartz ed., 1956).

18. Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

19. “[M]odern societies have a strongly intentional quality. What in other civilizations could most often be entrusted to ancestral custom, modernity had to convert into articulated values and purposes.” William M. Sullivan, *Reinstitutionalizing Virtue in Civil Society*, in *SEEDBEDS OF VIRTUE: SOURCES OF COMPETENCE, CHARACTER, AND CITIZENSHIP IN AMERICAN SOCIETY* 189 (Mary Ann Glendon & David Blankenhorn eds., 1995).

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secularist stress on fact and reason tended to elevate matters that can be analyzed empirically and to denigrate morals as opinion.

C. Freedom and Democracy

Secularism attacked the institutional power of the Church and the economic and political systems that the Church traditionally bolstered. Liberal economists decried government controls of the economy which the Church often supported, such as rules fixing “just prices” and prohibiting usury.²⁰ More generally, the Church distrusted market activity. In feudalism, wealth was inherited and thus a gift from God; individual initiative was fruitless since it could rarely alter one’s wealth or status. The few medieval merchants who were exceptions in this system nettled the Church by creating their own wealth. The very possibility of gain diverted merchants’ attention from salvation of the soul to profit and material comfort. Most Church magnates came from the nobility and so accepted aristocratic wealth, but they resented rich merchants who were commoners.

Secularists championed individual freedom and democracy.²¹ This embarrassed the Church, which long condoned serfdom and was itself the feudal overlord of many medieval serfs. Even into this century the Catholic Church resisted democracy, under which its extensive temporal power could be terminated by the will of the majority.²² Democratic theory combined with insistence on reason to traduce the Church’s religious authority by exhorting people to think for themselves. To Kant, this

20. See ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 52–53, 89–91, 140–43, 330 (Mortimer J. Adler et al. eds., Encyclopaedia Britannica 1952) (1776) (criticizing regulation of wages and prices and prohibition on charging interest).

21. As Mill put it: “The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it.” JOHN STUART MILL, ON LIBERTY 14 (David Spitz ed., Norton Critical ed. 1975) (1859). Some Enlightenment philosophers, however, advocated enlightened despotism. See 2 ENCYCLOPEDIA OF PHILOSOPHY 522–23 (Paul Edwards ed., 1967).

22. Some consider religion inherently authoritarian and undemocratic. See Stephen G. Gey, *Why Is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75, 184 (1990).

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imperative defined the Enlightenment: "Enlightenment is man's release from his self-incurred tutelage. Tutelage is man's inability to make use of his understanding without direction from another. . . . [I]n matters of religion immaturity is not only the most harmful but also the most degrading of all."²³ Secularism treats religion as a matter of opinion, and in a democracy one person's opinion is no better than another's. This attitude clashed with the Church's claim to exclusive access to divine truth. Democracy's promise of earthly comfort and justice also contravened the Church's vision of earthly woe that can be relieved only by God in the life to come.

Loosely related to the movements for individual freedom and democracy was nationalism. Under nationalism, liberty was demanded not just for individuals but for nations. Democracy was pointless or dangerous to a nationality if it was submerged as a minority in an empire. Hegel believed that individual freedom is best realized in the nation-state.²⁴ Most nationalists did not overtly oppose religion; indeed, in countries like Ireland where the national religion differed from that of the foreign ruler, religion invigorated the nationalists' struggle for independence. Nonetheless, nationalism subverted religion by erecting a secular god that competed, even if unintentionally, with divinity; patriotism diverted energy and attention from religion.

Nationalism deepened rifts that religion had smoothed over. The principal bond that made Europe socially coherent was Christianity.²⁵ This bond was frayed but not shattered by the Reformation.²⁶ Nationalism aggravated divisions that shredded this unity. The Latin Mass, for example, was undemocratic because it was incomprehensible to most people and it clashed with the promotion of national tongues. Nationalism required not just statehood but veneration of a particular national char-

23. IMMANUEL KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS AND WHAT IS ENLIGHTENMENT* 83, 89 (Lewis White Beck trans., 2d ed., Macmillan 1985) (1784).

24. See G.W.F. HEGEL, *LECTURES ON THE PHILOSOPHY OF HISTORY* 40-53 (J. Sibree trans., 1900) (1830).

25. See CHRISTOPHER DAWSON, *THE HISTORIC REALITY OF CHRISTIAN CULTURE* 35 (Greenwood Press 1976) (1960) ("[I]t was only as Christendom—the society of Christian peoples—that the tribes and peoples and nations of the West acquired a common consciousness and a sense of cultural and spiritual unity.").

26. See Edmund Burke, *Thoughts on French Affairs* (1791), in *SELECTED WRITINGS OF EDMUND BURKE* 424, 427-30 (W.J. Bate ed., Greenwood Press 1975).

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acter and culture,²⁷ which opposed Christian universalism. The temporal power of the Church also inflamed nationalism; payments extracted by Rome were resented as depredations of a foreign power.

The Church resisted freedom and democracy not only in doctrine but also with its institutional power.²⁸ The medieval Church performed many governmental functions, such as operating England's courts of equity. Despite the rise of the nation-state, civil bureaucracies remained weak, inept, and thinly staffed in most countries. The Church, however, boasted a vast, bright, and skilled bureaucracy. By its control of most schools, its employment of most scholars, and its access to the populace through local pulpits, the Church influenced and often dominated public debate. Critics charged that this influence benefitted the Church, not the people. Where the Catholic Church was ousted during the Reformation, its position was generally assumed by a Protestant church, as happened in England. The Catholic Church's domination of so much public administration blocked the development of the involved, independent-minded citizenry needed for a democracy.

Hostility to ecclesiastical power—*i.e.*, anti-clericalism—grew even among believers. For example, Hume said: “[I]n all ages of the world, priests have been enemies to liberty.”²⁹ As a remedy secularists advocated disestablishment of religion, as enshrined in the First Amendment to our Constitution.

D. *Morality and Theories of Human Nature*

Secularists not only condemned religion's reliance on faith, authority, and tradition but also mocked Judeo-Christian morality as silly or repressive and attacked the belief in man's innate sinfulness. They believed that people are naturally good; in a just state, stern legal constraints would be unnecessary

27. The eighteenth century philosopher Johann Herder, “the first and greatest philosopher of nationalism” and “the father of romantic nationalism,” held this view. William Ewald, *Comparative Jurisprudence (I): What Was It Like to Try a Rat?*, 143 U. PA. L. REV. 1889, 2008, 2011 (1995).

28. See DAVID THOMSON, *EUROPE SINCE NAPOLEON* 103–04 (1957) (“The biggest obstacles to a broader basis of government were the powers and privileges of the aristocracy and the Church . . .”).

29. David Hume, *Of the Parties of Great Britain* (1741), reprinted in DAVID HUME'S POLITICAL ESSAYS 85, 86 (Charles W. Hendel ed., 1953).

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and undesirable. They also dismissed religious claims of an extratemporal meaning or purpose of life as useless, even destructive.

1. Human nature and punishment

Enlightenment philosophers, led by Rousseau, disputed the gloomy Christian conviction that people are by nature sinful: "They were convinced that the overwhelming number of men, if their natural goodness were not perverted in childhood, would act in harmony with simple rules and the dictates of rational principles without the necessity for severe restraints and awful punishments."³⁰ Although the Church denounced sin and insisted on impossibly high standards of conduct, this attitude led paradoxically to self-fulfilling fatalism, a resignation to human wretchedness and injustice. Such a result was considered either an inevitable consequence of natural human behavior or just punishment from God because of man's sinfulness. Popular acceptance of earthly misery served the purposes of the Church: hope of worldly progress would distract people from the Church's focus on the afterlife and lead them to question the established order, including the Church.

Because it considered man inherently sinful, the Church demanded strict moral and legal codes. Moral education instilled a personal conscience based on guilt and shame even for having sinful thoughts. Sin was not an abstraction; it lived in the quasi-human form of a devil who tempts the weak to transgress and then punishes them with eternal torture. The Church also backed harsh laws and punishment to suppress the wickedness that can easily erupt and overwhelm society. These laws forbade not only violence and fraud but violations of the Church's moral code and challenges to its doctrines.

Secularists believed people are naturally virtuous but corrupted by evil institutions, notably the Church and the family. They condemned strict discipline of children and criminal laws.³¹ Most Enlightenment philosophers "believed that it did not require the threat of eternal torment in hell to make moral ideas generally accepted among mankind."³² Since people mis-

30. FRANK E. MANUEL, *THE AGE OF REASON* 46-47 (Edward W. Fox ed., 1951).

31. See *infra* text accompanying note 39.

32. MANUEL, *supra* note 30, at 46-47.

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behave only because of deleterious social conditioning, punishment for misdeeds is unjust. As Bentham put it: "[A]ll punishment is mischief: all punishment in itself is evil."³³ Instead, society should gently rehabilitate wrongdoers and, more importantly, correct the social conditions that lead to crime. Christianity, however, endorsed the idea of redemption but generally blamed misbehavior on individual sinfulness, not on society. Its belief in man's innate sinfulness could not square with rehabilitation by gentle means.

2. *Psychiatry and sin*

Medieval Christianity treated sex as generally sinful. Sex was condoned only for procreation, not pleasure, so homosexuality, contraception, and sex outside marriage were outlawed. Marriage itself had to be monogamous and permanent; divorce was prohibited. The male sex drive was tolerated as inevitable, but female sexual pleasure was condemned; wives were exhorted to submit to sex only to conceive or, if necessary, to accommodate husbands who might otherwise commit (and seduce another to commit) adultery. Most Protestants initially adopted or intensified the Catholic hostility to sex. Judaism did not condemn sex as inherently wicked but distrusted and restricted it at least as much as Christianity did.

Sigmund Freud rejected Rousseauian optimism about human nature; he realized that all people harbor dark urges, including murder, and he conceded society's need to restrain these urges:

[M]en are not gentle, friendly creatures wishing for love, . . . but that a powerful measure of desire for aggression has to be reckoned as part of their instinctual endowment. *Homo homini lupus* [Man to man is a wolf]

. . . Civilized society is perpetually menaced with disintegration through this primary hostility of men towards one another. Their interests in their common work would not hold them together; the passions of instinct are stronger than reasoned interests. Culture has to call up every possible reinforcement in order to erect barriers against the aggressive

33. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 158 (J.H. Burns & H.L.A. Hart eds., Athlone Press 1970) (1789).

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instincts of men and hold their manifestations in check by reaction-formations in men's minds. Hence its system of methods by which mankind is to be driven to identifications and aim-inhibited love relationships; hence the restrictions on sexual life; and hence, too, its ideal command to love one's neighbor as oneself, which is really justified by the fact that nothing is so completely at variance with original human nature as this. With all its striving, this endeavour of culture's has so far not achieved very much.³⁴

However, Freud also denounced Judeo-Christian sexual taboos as the source of most human unhappiness (neurosis).³⁵ Religious sexual morality was itself caused by neuroses, such as an unnatural fear of sex. Freud considered sexual drives healthy and normal unless perverted by one's upbringing. Some sexual conduct should be illegal to protect children and prevent coercion, but all sex between consenting adults should be permitted. Some of Freud's followers went further in condemning traditional sexual taboos as the root of most social ills and in proclaiming sexual liberation as the path to peace and joy.³⁶

Another school of psychology—behaviorism—contended that all behavior is simply a physiological reaction to external stimuli based on the conditioning of the organism.³⁷ Behaviorism collided with the Christian tenet that God gives man free will.³⁸ Much rides on this disagreement, including the idea of sin; if human conduct stems exclusively from conditioning, it is

34. SIGMUND FREUD, *CIVILIZATION AND ITS DISCONTENTS* 85–87 (Ernest Jones ed. & Joan Riviere trans., Hogarth Press 1957) (1930).

35. Freud "saw that society imposes unnecessary hardships on man [T]his unnecessary harshness, as it operated in the field of sexual morality, led to the formation of neuroses that, in many cases, could have been avoided by a more tolerant attitude." ERICH FROMM, *THE CRISIS OF PSYCHOLANALYSIS* 30 (1970). These themes pervade Freud's work, but are especially prominent in SIGMUND FREUD, *THE FUTURE OF AN ILLUSION* (James Strachey ed. & trans., W.W. Norton & Co. 1989) (1927), SIGMUND FREUD, *MOSES AND MONOTHEISM* (Katherine Jones trans., Alfred A. Knopf 1939) (1934), and SIGMUND FREUD, *TOTEM AND TABOO* (James Strachey ed. & trans., W.W. Norton & Co. 1989) (1913).

36. See, e.g., HERBERT MARCUSE, *EROS AND CIVILIZATION: A PHILOSOPHICAL INQUIRY INTO FREUD* 36–39, 201–05, 209–10, 241–45 (1966) (discussing Freud and sexual liberation).

37. See "behaviorism" in the *CAMBRIDGE DICTIONARY OF PHILOSOPHY* 67 (Robert Audi ed., 1995).

38. The classic Christian doctrine of free will was articulated by Saint Augustine. See JAMES J. O'DONNELL, *AUGUSTINE* 72–79 (Twayne Publ. 1985) (1925) (describing Augustine's views on free will).

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unscientific and unjust to condemn thoughts or punish acts deemed evil. As one criminologist put it: "Man is no more 'responsible' for becoming wilful and committing a crime than the flower for becoming red and fragrant. In both instances the end products are predetermined by the nature of protoplasm and the chance of circumstances."³⁹ Thus criminals should not be punished as wicked-minded sinners but reconditioned to act as society wishes.

3. Marriage and romantic love

Through the Middle Ages, most considered romantic love unlikely or impossible within marriage.⁴⁰ Marriages were arranged by parents for political and financial reasons without regard for the desires of the couple. The Church further discouraged romantic love by ordaining the subordination of wives to husbands and condemning sex except for procreation. The Romanticists challenged the Church by demanding sexual equality and exalting romantic love and sexual pleasure for both sexes.⁴¹ They believed in marriage only when and if the couple were in love. Some advocated abolition of marriage, since if a couple were in love marriage was unnecessary, and if they were not in love they should not be married. Monogamy was deemed based on jealousy and therefore emotionally stifling.

Not all secularists shared this view. To Freudians, Marxists, and feminists, romantic love was an illusion that sublimated the sexual drive or diverted the consciousness of workers or women from their oppression. However, they agreed with the Romanticists that monogamy is sexually repressive and reduces married women to chattels. Thus, despite disagreements among themselves about romantic love, most secularists shared a dislike of the Church's view of marriage. They agreed that marriage, if not abolished, should be truly equal and that divorce should be readily available.

39. NATHANIEL F. CANTOR, *CRIME: CRIMINALS AND CRIMINAL JUSTICE* 266 (1932).

40. See JOHN C. MOORE, *LOVE IN TWELFTH-CENTURY FRANCE* 89-90 (1972).

41. Indeed, the Romanticists often treated romantic love as a religious experience. See IRVING BABBITT, *ROUSSEAU AND ROMANTICISM* 220 (1919). The Romanticists were diverse but generally favored "liberty, equality, fraternity," "modern democracy," and the "open society." 7 *ENCYCLOPEDIA OF PHILOSOPHY*, *supra* note 21, at 208-09.

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The Romanticists rejected many secularist canons. They shunned rationalism as cold and unfeeling and warned of science run amok.⁴² Accordingly, they had some sympathy for religion, which shared this dislike and venerated the spiritual qualities of faith, love, and mystery. Nonetheless, insistence on individual emotional freedom from authority placed the Romanticists fundamentally at odds with any church or religious orthodoxy.

4. *Positivism, materialism and moral relativism*

The nineteenth century spawned several philosophies that dismissed the very idea of morality. Auguste Comte originated positivism,⁴³ which glorified the social sciences. It demanded verifiable facts and dismissed all idealism, including moral philosophy.

These principles were shared by materialism, the doctrine that reality consists only of physical matter. The most influential materialist was Karl Marx, who held that all ideas (including moral beliefs) grow out of prevailing modes of production and property relations. In *The Communist Manifesto*, Marx and Friedrich Engels declared that “[t]he history of all hitherto existing society . . . is the history of class struggles.”⁴⁴ In this struggle, the ultimate triumph of the working class and of socialism was historically inevitable: the class struggle necessarily leads to the “dictatorship of the proletariat.”⁴⁵ To Marxists, religion always fortifies the ruling class against the working class; it is “the opium of the people”⁴⁶ and would disappear under socialism. Some socialists were religious and even erected socialist beliefs on a religious foundation, but most socialists ignored or opposed religion. Even the National Social-

42. Mary Wollstonecraft Shelley's *Frankenstein*, published in 1818, is among the first expressions of this alarm.

43. *The Positive Philosophy of Auguste Comte* “has always been treated by Comte and by his adherents as the first sketch of the ‘Positive Philosophy.’” Frederic Harrison, *Introduction to THE POSITIVE PHILOSOPHY OF AUGUSTE COMTE* at viii (Harriet Martineau ed. & trans., London, George Bell & Sons 1896).

44. KARL MARX & FREDERICK ENGELS, *THE COMMUNIST MANIFESTO* 12 (New York Labor News 1968) (1848) (footnote omitted).

45. Letter from Karl Marx to George Weydemeyer (Mar. 5, 1852), in *I KARL MARX: THE REVOLUTIONS OF 1848: POLITICAL WRITINGS* 28 (D. Fernbach ed., 1973).

46. See MARX, *supra* note 14, at 131.

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ists (Nazis), bitter enemies of Marxism, were hostile to traditional religions.⁴⁷

Marxists derided Rousseauian romantics, yet both believed in easy human perfectibility; under the right economic and political system, misconduct would soon vanish.⁴⁸ As Marx declared, men's "social existence . . . determines their consciousness."⁴⁹ Marxists believed that, after a brief interlude when capitalism was eradicated and socialism installed, government could be eliminated as appropriate conduct fell into place naturally.⁵⁰ Speculation about what that conduct might be was unimportant.

Other positivist, materialist philosophies with wide followings were utilitarianism and pragmatism. Utilitarians proclaimed: "[T]he greatest happiness of the greatest number is the foundation of morals and legislation."⁵¹ The morality of an act depends solely on whether it advances or frustrates this ideal. Only the individual can legitimately judge his own interests.⁵² Thus government should follow the democratically expressed will of the people about what will promote their happiness. In this view, morality is a matter of taste; one can measure public attitudes about morals, but it is as pointless to discuss "right" and "wrong" in morals as in fashion.

Pragmatism held that the only test of the truth of a principle is its practical result.⁵³ Since the utility of a principle varies according to time and place, there are no absolute moral truths. This theory denigrated moral philosophy by stressing the practical rather than the metaphysical questions central to moral

47. See STANLEY G. PAYNE, *A HISTORY OF FASCISM, 1915-1945*, at 200-01 (1995) (describing the hostility of the Nazis and some, though not all, Fascist movements to Christianity).

48. Thus Marx has been called "most definitely the child of his age, the child of rationalistic optimism." ADAM B. ULAM, *THE UNFINISHED REVOLUTION* 43 (1960).

49. KARL MARX, *A CONTRIBUTION TO THE CRITIQUE OF POLITICAL ECONOMY* 21 (Maurice Dobb ed. & S.W. Ryazanskaya trans., Progress Publ. 1970) (1859).

50. See FREDERICK ENGELS, *ANTI-DÜHRING: HERR EUGEN DÜHRING'S REVOLUTION IN SCIENCE* 389 (F. Engels ed., Publishing House 1954) (1894) ("The State is not 'abolished,' it dies out.").

51. Jeremy Bentham, *The Commonplace Book*, in 10 *THE WORKS* 141, 142 (J. Bowring ed., 1962) (1843), quoted in *OXFORD DICTIONARY OF QUOTATIONS* 64 (Angela Partington ed., 4th ed. 1992).

52. See *supra* note 21; *infra* note 71.

53. See WILLIAM JAMES, *PRAGMATISM: A NEW NAME FOR SOME OLD WAYS OF THINKING* 200-01 (1907).

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discourse; it especially marginalized religious morality, which posits divinely ordained, eternal moral truths.⁵⁴

Some philosophers shed even the pragmatic principle, leaving only individual preference. Jean Paul Sartre, the leading existentialist philosopher, said "life has no meaning [in itself] . . . it is up to you to give it meaning, and value is nothing but the meaning that you choose."⁵⁵ Moral relativism came to dominate anthropology and sociology; moral judgments about different cultures or groups within a culture were condemned.⁵⁶ This view is echoed by contemporary "multiculturalism," which proclaims the moral and cultural equality of all social groups.⁵⁷ Thus, law may legitimately forbid only acts that harm others. As J.S. Mill declared, "the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection . . . [that is,] to prevent harm to others."⁵⁸ Government must be neutral about the morality of conduct that does not harm others.⁵⁹ These attitudes slight religion, which has traditionally furnished a broader moral code (often condemning, for example, drug use, gambling, suicide, homosexuality, prostitution, and illegitimacy) which was then promulgated and enforced by government.

54. Thus, John Dewey argued that philosophy should "surrender all pretension to be peculiarly concerned with ultimate reality" and accept that "no theory of Reality in general, *überhaupt*, is possible or needed." John Dewey, *The Need for a Recovery of Philosophy* (1917), in 10 THE MIDDLE WORKS 3, 38-39 (Jo Ann Boydston & Anne Sharpe eds., 1980).

55. JEAN PAUL SARTRE, EXISTENTIALISM 58 (Bernard Frechtman trans., 1947).

56. As stated in a leading sociology textbook: "We must recognize that judgments about good and bad, moral and immoral, depend very much on who is doing the judging; there is no universal standard to appeal to." IAN ROBERTSON, SOCIOLOGY 68 (1981).

57. See Charles Taylor, *The Politics of Recognition*, in MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 25, 64-66 (Amy Gutmann ed., 1994) (acknowledging, but not fully accepting, the demand "that we all *recognize* the equal value of different cultures," "that we owe equal respect to all cultures," and that "true judgments of value of different works would place all cultures more or less on the same footing").

58. MILL, *supra* note 21, at 10-11.

59. "[G]overnment must be neutral on what might be called the question of the good life. . . . [P]olitical decisions must be . . . independent of any particular conception of the good life, or of what gives value to life." RONALD DWORKIN, A MATTER OF PRINCIPLE 191 (1985); see also Bruce Ackerman, *Why Dialogue?*, 86 J. PHIL. 5, 16 (1989) ("We should . . . put the moral ideals that divide us off the conversational agenda of the liberal state.").

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5. *Temporal progress and sexual morality*

In addition to the philosophical attacks on religious morality, economic growth, scientific progress, and expanding individual liberty made religious sexual strictures seem antiquated. Voltaire declared it “one of the superstitions of the human mind to have imagined that virginity could be a virtue.”⁶⁰ In pre-industrial societies, religious condemnation of illegitimacy had served an economic purpose—children who lack a father’s support are often destitute. However, science soon developed contraceptives that permitted sex with a low risk of childbirth (in or outside marriage). Expanding wealth seemed to further obviate this problem. Single parents could support children, and government could easily support the few children in need.

The population explosion generated by modern medicine and economic growth made taboos against contraception seem not only phobic but socially disastrous. Laws against contraception, abortion, extramarital sex, and homosexuality also trammelled personal freedom. Although these laws did not establish religion, they were religiously inspired and thus considered by secularists incompatible with the separation of church and state. Sexual conduct was simply none of the state’s business.

6. *The family and moral duties to others*

Most religions, including Christianity and Judaism, not only condemn certain behavior but also impose affirmative duties to other people. Christians are enjoined to help the needy, to do unto others as you would have them do unto you,⁶¹ and to “love thy neighbor as thyself.”⁶² Much of morality concerns marriage and the family, institutions shaped by religion in nearly all societies. The center of Jewish life is often said to be the home, not the synagogue.⁶³ From the first, Christians rejected the

60. Francois-Marie Arouet (Voltaire), *The Leningrad Notebooks*, in II VOLTAIRE’S NOTEBOOKS 455 (T. Besterman ed., 2d ed. 1968).

61. See *Matthew* 7:12. The full statement is: “Therefore all things whatsoever ye would that men should do to you, do ye even so to them” *Id.*

62. *Matthew* 19:19.

63. See Michael Fishbane, *Judaism: Revelations and Tradition*, in RELIGIOUS

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marital customs of the Roman Empire by forbidding divorce and polygamy. Marriage is one of the seven Christian sacraments. Children are enjoined by the Ten Commandments to honor their parents,⁶⁴ and husbands' control of their wives is mandated because of Eve's sin.⁶⁵ Husbands must work to support their wives and children. Both parents are responsible for the moral education of their children.

Secularists criticized those religious norms concerning the family as sexist,⁶⁶ and they viewed monogamy as sexually stifling for both sexes. Traditional marriage also denied human freedom. English jurist Henry Maine declared: "[T]he movement of the progressive societies has hitherto been a movement *from Status to Contract*."⁶⁷ In the family, however, rights and duties are determined by status. Husbands had to support their wives and children; their property could be seized for this purpose, and they could be jailed if they refused to work. Except in cases of extreme misconduct, a marriage could not be terminated, even by mutual consent.

To many secularists, parental authority infringed the rights of children and often damaged their psyches. Many parents instilled noxious ideas (including religion) and by corporal punishment conditioned children to violence. The family was alleged to inure children to the defects of marriage: abuse of women, men as resentful drones, sexual jealousy, and cohabitation without love. The cultivation of family loyalty, it was further argued, breeds indifference or hostility to strangers.⁶⁸ Traditional families may view outsiders not as fellow human beings or, for Marxists, proletarian comrades, but as nonentities or competitors for earthly goods.

TRADITIONS OF THE WORLD 109 (H. Byron Earhart ed., 1987) ("Traditionally, the home is the nuclear holy space and the family the nuclear ritual unit of Judaism.").

64. "Honour thy father and thy mother . . ." *Exodus* 20:12.

65. "To the woman [God] said . . . thy desire shall be to thy husband, and he shall rule over thee." *Genesis* 3:16.

66. See FREDERICK ENGELS, *THE ORIGIN OF THE FAMILY, PRIVATE PROPERTY AND THE STATE* 125 (International Publ. 1972) (1884) (describing marriage and the family in "civilized" societies as "based on the supremacy of the man").

67. HENRY JAMES SUMNER MAINE, *ANCIENT LAW* 100 (Ernest Rhys ed., J.M. Dent & Sons 1931) (1861).

68. This view dates at least to Plato. See *THE REPUBLIC OF PLATO*, bk. 5, §§ 461–65 (Allan Bloom trans., 1968).

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Many secularists, therefore, advocated radical change of legal and social attitudes toward the family. Some backed abolition of traditional marriage. Simone de Beauvoir wanted to forbid women from being economic parasites of their husbands.⁶⁹ At the least, sex roles would be eliminated and divorce granted at the request of either party without regard to fault. Many advocated communal rearing of children or, at least, severe limitation of parental control. Corporal punishment would be forbidden. Education of children would be dictated by the state, not parents. State schools would rectify the pernicious influence of parents.

Even the religious ideal of charity was attacked. The argument proceeds as follows: if services are socially useful, they should be provided not by volunteers but paid for by society, *i.e.*, by the government. This is only fair to the providers and helps to ensure reliable and competent service. Charity requires voluntary gifts; noncontributors free-ride on the benefits of those who give. Funding social welfare programs with taxes prevents free-riding. Charities often try to impose their morals on recipients. This degrades the needy, who deserve assistance from society as an entitlement. Social Darwinists also objected to charity because it thwarts natural selection and would "bequeath to posterity a continually increasing curse."⁷⁰ Although these secularist views differed radically, they all repudiated religious traditions of charity.

E. The Meaning of Life

At the deepest level, secularism opposed religious doctrines about the meaning of life. Most religions, including Christianity and Judaism, preach belief in and obedience to God in order to be saved in a world to come. Secularists instead seek worldly goals. Material wealth, always a human ambition, became more attainable and respectable and the principal measure of government success in market economies. Socialists shared the emphasis on wealth, although they stressed its equal distribution and charted a different path to economic growth. For many, socialism was a secular religion which gave purpose to

69. See SIMONE DE BEAUVOIR, *THE SECOND SEX* 482 (H.M. Parshley ed. & trans., 1953) (advocating a prohibition of "marriage as a 'career' for [a] woman").

70. HERBERT SPENCER, *SOCIAL STATICS* 151 (D. Appleton & Co. 1910) (1892).

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life. For them, the quest for scientific (including medical) progress dovetailed with pursuit of economic growth. Enjoyment of music, art and literature, sexual gratification, fame, and power were compatible secular objectives. Many secularists championed inner-directedness or self-realization as the psychological ideal, the highest human goal;⁷¹ those who pursue goals laid down by others (including religious goals) are emotionally stunted. However, secularists rejected the idea of a transcendental meaning of life as silly or, worse, pernicious.

Secularism offered an enticing alternative to religion. Human flourishing—"life, liberty and the pursuit of happiness"—seemed not only possible but much easier to attain by a secular path than by a religious path. Since the demise of religion beginning in the Enlightenment, humanity had become freer, wiser, richer, and better able to seek a good life. By contrast, the earlier period seemed to be a dark age of poverty, ignorance, superstition, and oppression, all abetted by religion. Secularists envisioned unending human progress as religion was marginalized and gradually disappeared. But religion has not faded away.

II. THE DEMISE OF SECULARISM

Even secularists admit that religion has not faded away as forecasted; indeed, except among intellectuals, it always retained a wide following. Religion is now enjoying a renaissance in many places, particularly America. Secularism survives, but debate has shifted in favor of religion for two primary reasons. First, religion has changed; many secularist criticisms of religion are no longer valid in liberal democracies. Second, many promises of secularism were not fulfilled. As a result, regard for secularism has diminished, while regard for religion has advanced in both public affairs and private morality. Before chronicling these trends, however, it is important to show why secularism has always been weaker in America than in many European countries.

71. This view is espoused by some modern psychologists. *See, e.g.*, DAVID RIESMAN, *THE LONELY CROWD* (1961). But it dates at least to Mill's famous essay *On Liberty*: "He who lets the world, or his own portion of it, choose his plan of life for him, has no need of any other faculty than the ape-like one of imitation. He who chooses his plan for himself, employs all his faculties." MILL, *supra* note 21, at 56.

A. American Exceptionalism

History did not see secularism flourish in America as it had in Europe.⁷² No American colony had a church with the temporal power the Catholic Church exerted over all Europe in the Middle Ages. America had no ecclesiastic hierarchy like the Vatican; there were few monks and monasteries and many popular sects had no bishops. The most religiously fervent colonies were grass roots Protestant with ministers hired and fired at the whim of their congregations. No church was ever a significant land owner. A few colonies (notably Massachusetts) began as virtual theocracies and had established churches supported by taxes, but these exceptions withered by the early nineteenth century.⁷³ Thus America had little of the anti-clericalism that was so common in Europe.

In some communities, religion was invoked to repress speech and behavior and to perpetrate a few atrocities, notably the Salem witch trials, but these too were exceptions. With literacy widespread, a relatively free and vigorous press, and sectarian power weak and fragmented, intolerant religionists generally lacked the muscle to squelch ideas and practices they opposed. A few nonconformists were prosecuted for blasphemy, but refuge was rarely far away. Such repression extended only to theology. Unlike Europe, America never experienced ecclesiastic suppression of democracy, private enterprise, and education. Instead, in America religion often spawned progressive ideas. Much American political theory grew out of the Protestant Enlightenment, which proclaimed freedom of conscience as a divine gift which man must not curtail. As Jefferson rhetorically asked: "[C]an the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are of the gift of God?"⁷⁴ Some wanted to limit freedom of conscience

72. See generally SEYMOUR MARTIN LIPSET, *AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD* 60–67, 154–57 (1996).

73. See ANSON PHELPS STOKES & LEO PFEFFER, *CHURCH AND STATE IN THE UNITED STATES* 76–78 (rev. ed. 1964) ("Final disestablishment [came] in 1833, when, by a ratio of 10 to 1, the voters of Massachusetts adopted a constitutional amendment which finally separated Church and State [R]eligious societies were thenceforth to be both self-governing and self supporting.").

74. THOMAS JEFFERSON, *NOTES ON VIRGINIA* (1784), reprinted in *THE LIFE AND*

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to private behavior or thought, but for most Americans this divine right was broader.⁷⁵ Religion also favored democracy. Congregationalists repressed religious minorities, but each congregation operated democratically, not by papal or episcopal decree. Because of this freedom, Americans were religious to a degree that astonished foreigners like de Tocqueville.⁷⁶

Among industrialized nations, America is still exceptionally religious. Recent trends in religious identification and observance in America are mixed, but overall they have not weakened and in many ways are enjoying a rebirth. Membership and attendance are declining in mainstream churches (Episcopalian, Presbyterian, Methodist, Church of Christ, Reform Jewish) but surging in many sects outside the mainstream.⁷⁷ Even social democrats,⁷⁸ who once were mostly secularist, now view religion more favorably.⁷⁹ The vast majority of Americans believe in a personal God, which is not true in many Western nations.⁸⁰

Not surprisingly, then, attitudes toward religion in America have differed from those in Europe. Americans have less fear of

SELECTED WRITINGS OF THOMAS JEFFERSON 173, 258 (Adrienne Koch & William Pedens eds., 3d prtg. 1993).

75. Some historians ascribe America's religious tolerance primarily to secular doctrine. See Smith, *supra* note 6, at 157 n.26. Others, however, stress the religious bases of religious tolerance, and even those who disagree concede that religious doctrine was a contributing factor. See *id.*

76. See ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 287-301, 448-49 (J.P. Mayer ed. & George Lawrence trans., Anchor's Book 1969) (1835).

77. See Martin Marty, *Religion in America Since Mid-Century, in RELIGION AND AMERICA: SPIRITUAL LIFE IN A SECULAR AGE* 281-83 (Mary Douglas & Steven Tipton eds., 1983) (discussing the resurgence of religion since the mid-twentieth century).

78. The term "liberal," which is now applied to the democratic left, once referred to people like Locke, Jefferson, and Madison, who were not secularists. Accordingly, this article will refer to such people as "social democrats," as is done in Europe.

79. See generally STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION (1993).

80. On the high rate of religious belief in America, see, for example, statistics provided in GEORGE GALLUP, JR. & SARAH JONES, 100 QUESTIONS AND ANSWERS: RELIGION IN AMERICA 4 (1989) and ROBERT WUTHNOW, THE RESTRUCTURING OF AMERICAN RELIGION: SOCIETY AND FAITH SINCE WORLD WAR II 300 (1988). For viewpoints expressing an increasing trend in religious faith in America, see Theodore Caplow, *Contrasting Trends in European and American Religion*, 46 SOC. ANALYSIS 101, 103 (1985) ("America is distinctly more pious than two generations ago."). Even among scientists, belief in God remains quite high. See Natalie Angier, *Survey of Scientists Finds a Stability of Faith in God*, N.Y. TIMES, Apr. 3, 1997, at A10 ("[M]any scientists believe in God by the most mainstream, upper-case definition of the concept."). Forty percent of U.S. scientists surveyed believed in God; forty-five percent did not. *Id.*

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religion as a source of social strife. Religion has always figured prominently in American public debate. Indeed, despite America's general religious freedom and tolerance, Americans have rarely condoned atheism in public figures—not just in politicians but in entertainers.⁸¹ Moreover, because of America's early adoption of democratic capitalism, many modern developments that cause disillusionment with secularism struck soonest and hardest in America. In discussing the demise of secularism, then, it is often necessary to note America's distinctiveness.

B. Religion in the Public Arena

Secularism held that religion was the enemy of science and reason, economic progress, freedom and democracy, civic virtue, and social cohesion. Changes in religion and problems with secularism have discredited this secular catechism.

1. Science and rationalism

Except for fundamentalists who favor biblical over scientific explanations of the history of the Earth and universe, most religions now accept modern science and scientific research. Further, science no longer seems a secular panacea. Medicine, science, and technology have lengthened and improved material existence. But scientific progress also creates new problems—by reducing mortality, medicine triggered a population explosion that many believe has already diminished the quality of life and may become catastrophic. In addition, technological progress spawned environmental degradation and created weapons of mass destruction.

Science also produced a host of new moral problems, often involving manipulation of human life. For example, science has learned to alter human genes so as to engineer people with preselected, unprecedented features, or even to clone ourselves. But is it right to do so? Science cannot answer this question. Indeed, scientists who develop these new capabilities are often numb to ethical questions that lay people sense immediately.

81. A telling example is the stir created in America when John Lennon stated that The Beatles were "more popular than Jesus." OXFORD DICTIONARY OF QUOTATIONS 417 (Angela Partington ed., 4th ed. 1992).

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Even sophisticated secular philosophies usually omit these questions: Marxist and liberal theory say nothing about them. With no other source of guidance available, many people turn to religion to justify and define respect for human life and dignity.

Industrialization devastated the environment. Polluters do not contract with their victims, so market activity cannot solve this problem; and pollution crosses political boundaries, so national laws are often inadequate. More important, most secular philosophies consider only the material interests of existing adults and interest groups. Even solicitude for one's own descendants does not count in most secular equations of happiness, so secularism weakened concern for children. *A fortiori*, these doctrines ignore future generations and snub concerns about animals or the Earth as supernatural claptrap. As Max Weber perceived, rationalism and secularism desacralized the physical world.⁸² Religion, however, often values these concerns. In Judeo-Christian doctrine, for example, God gave man dominion over the Earth and its creatures,⁸³ but God also saw "everything that he had made" and pronounced it "very good."⁸⁴ Man may use the Earth for his benefit but must respect, not destroy, it.⁸⁵ Religion is concerned with future generations because they too will be God's creatures, which is part of His plan. Thus religion provides an ethical doctrine to address dilemmas with which science and reason cannot cope.

Science redrew man's self-portrait, but not for the better. Freud confirmed man's innate aggressiveness.⁸⁶ The theory of evolution led to Social Darwinism: man was no longer created in God's image, but just another organism prevailing (briefly) in the struggle for survival. This struggle improved the human race; helping or saving weaker individuals or races only degraded the species.⁸⁷ Such ideas inspired the Nazis' effort to

82. See MAX WEBER, *PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 908 (Talcott Parsons trans., Charles Scribner's Sons 1958) (1920).

83. See *Genesis* 1:26–30.

84. *Genesis* 1:31.

85. See, e.g., *THIS SACRED EARTH: RELIGION, NATURE, ENVIRONMENT* (Roger S. Gottlieb ed., 1996) (a collection of mandates of various religions and articles about religious commands to respect the Earth and its environment).

86. See *supra* text accompanying note 34.

87. This theory was developed by Herbert Spencer. See 1 HERBERT SPENCER, *THE PRINCIPLES OF ETHICS* 26, 49–55 (Liberty Fund 1978) (1897); 2 *id.* at 25–27, 33, 42, 446–47.

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exterminate or enslave supposedly inferior races and to en-throne a master race. Since secularism had negated the idea of morality and its religious underpinnings, it was difficult to protest such theories and actions on moral grounds.

Secularist schools of psychology have since waned. The Freudians' claim to be scientific has been challenged, especially because psychoanalytic theory cannot be empirically proved.⁸⁸ If life is considered to have no transcendental meaning, the self-realization championed by many psychologists⁸⁹ easily degenerates into petty self-gratification. The secularist indictment that religion inflicts psychological damage is no longer plausible. Evidence has increasingly shown that a spiritual purpose to life is crucial to mental⁹⁰ and physical health,⁹¹ and some scientists now believe that religion is an element of human well-being that has thrived through evolution.⁹²

The rationalist critique of tradition as mere prejudice has also foundered, even among secularists. Reason itself is unexceptionable, but reason untutored by experience often errs when it confronts enigmas like human nature and social behavior.⁹³ The repeated failures of social engineering, *i.e.*, socialism, confirm the poet's wisdom that "[t]he best-laid schemes o' [m]ice an' [m]en Gang aft a-gley."⁹⁴ In law, appreciation of the

88. See FREDERICK CREWS, *SKEPTICAL ENGAGEMENTS* at xii-xiii, xv-xvi, 7-8, 70-72, 88-91, 100-09 (1986) ("[N]o psychoanalytic or splinter school has provided cogent clinical support for any of its major developmental or therapeutic tenets, and the whole movement . . . is becoming ever more schismatic and doubt ridden.").

89. See *supra* text accompanying note 71.

90. See WILLIAM KIRK KILPATRICK, *PSYCHOLOGICAL SEDUCTION: THE FAILURE OF MODERN PSYCHOLOGY* 26-27 (1983) (noting that "psychology has rather less to contribute to [mental health] than is commonly thought and that Christianity has rather more"); Patrick F. Fagan, *Why Religion Matters: The Impact of Religious Practice on Social Stability* 4-7 nn.13-24, *The Heritage Foundation Backgrounder* (Jan. 25, 1996) (reporting that religious affiliation and church attendance correlate positively with reported happiness and well-being and negatively with stress).

91. See LARRY DOSSEY, *PRAYER IS GOOD MEDICINE: HOW TO REAP THE HEALING BENEFITS OF PRAYER* 49-50 (1996) (citing 130 studies concluding that prayer speeds recovery from sickness and injury); Fagan, *supra* note 90, at 10-11 nn.48-55 (reporting that religious commitment correlates positively with good health and greater longevity).

92. See, e.g., JAMES B. ASHBROOK & CAROL RAUSCH ALBRIGHT, *THE HUMANIZING BRAIN: WHERE RELIGION AND NEUROSCIENCE MEET* at xxi (1997).

93. See MICHAEL OAKESHOTT, *RATIONALISM IN POLITICS* 7-11, 23-28, 30 (1962) (distinguishing technical from practical knowledge, the latter being acquired by use and practice; and discussing the impact of inexperience on politics).

94. Robert Burns, *To a Mouse*, in *POEMS OF ROBERT BURNS* 70, 72 (Henry W.

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limits of reason bred renewed respect for the common law. As Holmes observed, “[t]he life of the law has not been logic: it has been experience.”⁹⁵ Tradition is now recognized to evolve by a Darwinian process; useful practices tend to survive and become customary while harmful practices die out, even though people may not comprehend why a given practice succeeds or fails any more than plants and animals understand why traits or species emerge or die out.

Rekindled admiration for tradition boosted religion, which depends greatly on tradition. Many religious beliefs and rituals that secularists once jeered are now known to satisfy important human needs. For instance, despite the stunning progress of medicine, prayer still promotes healing.⁹⁶ Religion may even save a group from extinction. It is hard to imagine that the Jewish people could have survived their many disasters without their religion, including its intricate rules secularists often mock. Finally, although science and reason can explain nature and improve material existence, they cannot supply a moral code or a meaning of life.⁹⁷ Recognition of the need to fill this gap has also spawned renewed respect for religion.

2. *The demise of socialism, the welfare state, and secular optimism*

Secularism advanced not only by discrediting religion but also by dangling seductive alternatives, especially socialism. Despite Marx’ contempt for idealism, Marxism appealed less for its promise of material wealth than for its vision of equality and brotherhood. In this century, dozens of nations tried socialism. It not only failed invariably to attain an earthly paradise but also, under Stalin and Mao, perpetrated two of the three worst slaughters in history.⁹⁸ That most socialists abhorred the atrocities of Marxist regimes only sharpened questions about the ramifications of socialism. If mass murder were an overt element of Marxism, one could devise a new plan without it.

Meikle & William Beattie eds., 1947).

95. O.W. HOLMES, JR., *THE COMMON LAW* 1 (Boston, Little, Brown & Co. 1881).

96. *See supra* note 91.

97. *See infra* text accompanying note 213.

98. The third occurred under Hitler in Nazi Germany, another atheist regime. *See supra* text accompanying note 47.

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But cruelty was not part of the plan, yet it happened anyway. Indeed, mass extermination was unnecessary for Stalin, Mao, and Hitler to grasp or consolidate power; they were already unchallenged when they killed. Their slaughters seem gratuitous.

Since Marxism purported to be scientific and historically inevitable, the barbarity of Marxist regimes sullied not only Marxism but all ideologies claiming historic or scientific foundations. Grandiose, untried schemes—"social engineering"—are now widely mistrusted. Rationalism fell from favor; many social theorists perceived that utopian dreams worked out on paper and based on reason alone rarely succeed.⁹⁹ The behavior of human beings and of civilization is complex and poorly understood; social change works better when it proceeds slowly, with a solid basis in experience and respect for traditional institutions, including religion. Moreover, plans for change should honor individual rights and not treat individuals as mere means to a collective goal. Even laudable ends do not justify inhumane means.

In some countries (Poland is a notable example), religion inspired resistance to socialist oppression. The disarray of societies that were freed from Marxism but then lacked any social adhesive further revealed the importance of religion.¹⁰⁰ The demise of Marxism stigmatized materialism generally. Marx considered ideas alone insignificant because they are strictly determined by material reality. We now appreciate that ideas do count; societies can be altered not only by an inexorable dialectical materialism but also by ideas.

Milder forms of socialism proved less repulsive than Marxism but still not very successful. Social ownership of the means of production—once a *sine qua non* for any socialist theory—now commands little support even in political parties that call themselves socialist.¹⁰¹ Social democracy (in America usually called the welfare state and created by those called liberals) has fared somewhat better. Even supposed conservatives

99. See *supra* text accompanying notes 93–95.

100. See *infra* note 148 and accompanying text.

101. Britain's socialist Labour Party abandoned its pursuit of this goal not long ago. See *We Can Do Business*, GUARDIAN, Sept. 5, 1996, at 21 (describing Labour Party's changing attitude toward private enterprise).

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like Ronald Reagan and Margaret Thatcher have attempted only minor reductions in social welfare programs, and many of those attempts failed. Nevertheless, the growth of the welfare state, which was so persistent through much of this century as to seem inevitable, has with widespread approval been halted and to some extent reversed.

On the surface, the problem was that advanced welfare states became too costly and seemed to strangle economic growth. However, many believe these economic effects stem from the welfare state's impact on social attitudes toward the family and individual responsibility. The cost of social programs exploded because of mounting divorce, illegitimacy, crime, and drug abuse. These changes confounded secularist optimism about human nature, the belief in innate human goodness and perfectibility. "The seductive idea at the heart of the liberal project has been the notion that increased individual freedom—and its institutional premise, the expansion of free exchange relations in a market society—automatically brings about general social betterment."¹⁰² The breakdown of this idea revived concern about the social significance of individual morality. Not only did crime proliferate but, for example, criminals increasingly expressed no remorse about their offenses.¹⁰³ These problems compelled reconsideration of religion. Individual morality is no longer widely dismissed as irrelevant or as a strictly private matter.

A related problem for liberal democracies is to provide for future generations, which will be affected by, but cannot currently vote on, policies concerning the environment,¹⁰⁴ the economy, government debt, and entitlements. Secular theories are concerned only with living (adult) voters. For the religious, however, future generations are part of God's creation. This is an example of religion giving moral guidance where secular doctrines do not.

For many, socialism was not just an electoral preference but an all-consuming cause that gave meaning to life much as reli-

102. Sullivan, *supra* note 19, at 188.

103. See, e.g., John J. DiIulio, Jr., *White Lies About Black Crime*, PUB. INTEREST Winter 1995, at 30, 36 (noting "the shockingly remorseless character of so many of today's violent . . . teenagers").

104. See *supra* text preceding note 82.

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gion does for believers. The demise of socialism triggered a spiritual crisis; it became, as Richard Crossman called Communism, "the god that failed."¹⁰⁵ Some reacted by embracing multiculturalism, a doctrine that locates the source of human fulfillment in identity groups.¹⁰⁶ For others the demise of socialism left a void, nihilism, and alienation. The recent fad for deconstructionism, a theory that denies any fixed meaning to language,¹⁰⁷ may be explained as a form of nihilism spawned by the breakdown of socialism.

3. *Economic growth and the Protestant ethic*

Market economists once criticized the Church for supporting deleterious economic regulation and for cultivating individual attitudes like fatalism about earthly existence and fixation on the afterlife that retard prosperity rather than traits like initiative and acquisitiveness which drive a market economy.¹⁰⁸ As religious views of capitalism changed, however, the role of individual morality in a market economy has become better understood. Religion now is less an impediment than an impetus to development of the industrious, prudent citizenry needed for a market economy to succeed.

The Catholic Church now accepts capitalism and individual enterprise, albeit with reservations; most Protestant sects never opposed these tenets to begin with. Calvinism long condoned accumulation of wealth. By the nineteenth century, the values crucial to market economies—education, thrift, sobriety, self-restraint, enterprise, and deferred gratification—became so identified with religion that Max Weber labeled them the "Protestant ethic."¹⁰⁹ In England, these values were spread by

105. THE GOD THAT FAILED: SIX STUDIES IN COMMUNISM (Richard Crossman ed., Bantam Matrix 1965) (1950) (quote comes from title of work).

106. See *infra* text accompanying note 149.

107. In deconstructionism "there is no intrinsic, organic, or 'motivated' reason for signifying a particular concept by means of a particular word; the meaning of a word is arbitrary but agreed upon by social convention." *Deconstruction*, in JOHNS HOPKINS GUIDE TO LITERARY THEORY & CRITICISM 185, 186 (Michael Groden & Martin Kreisworth eds., 1994); see also *infra* note 164 (alienation in modern life).

108. See *supra* text accompanying note 16.

109. See WEBER, *supra* note 82 (quote taken from book's title). The key role of Protestantism in the ascent of Western civilization is reaffirmed in DAVID S. LANDES, THE WEALTH AND POVERTY OF NATIONS: WHY SOME ARE SO RICH AND SOME SO POOR 177-78 (1998).

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Methodism, but their influence extended far beyond members of that sect. Samuel Smiles acknowledged the religious source of these values in his best-selling 1859 book *Self-Help*, which popularized the maxim: "Heaven helps those who help themselves."¹¹⁰ Nineteenth century England achieved extraordinary social progress by the diffusion of middle class values based on religious beliefs.¹¹¹ In America, as in England, Methodism won great popularity, and religion was generally viewed as buttressing desirable middle class values.

The importance of the Protestant ethic is most evident in nations where that ethic never existed, especially the formerly Communist nations of Eastern Europe. Unlike the third world, these countries have an educated populace and a substantial industrial base. For most, however, transition to a market economy has so far produced economic shrinkage because of rampant crime, corruption and cronyism, and lack of entrepreneurship and savings for capital investment. The exceptions are countries like Poland and the Czech Republic, where a strong church persisted through the Communist period and preserved the needed values.

The economic importance of individual morality is apparent in capitalist countries as well. Those who lack the Protestant ethic are more likely to be poor, sick, addicted to drugs, and in jail. The economic prosperity of a nation depends on how many citizens adhere to the Protestant ethic. Thus concern for both individual suffering and a nation's economy leads to concern about individual values, which inherently draws attention to religion.

Despite its success, capitalism stirs criticism from liberal democrats as well as socialists. By rewarding work, sobriety, and thrift, capitalism encourages institutions that foster these traits, especially the family. However, capitalism also exalts material consumption, which subverts the same values; those who prosper lose the drive to work hard, take risks, be thrifty,

110. SAMUEL SMILES, *SELF-HELP* 21 (rev. ed., Harper & Bros. 1877) (quoting the "well-tried maxim"). The adage is attributed to many people, including Erasmus. See A DICTIONARY OF AMERICAN PROVERBS 255 (Wolfgang Mieder et al. eds., 1992).

111. See generally GERTRUDE HIMMELFARB, *POVERTY AND COMPASSION: THE MORAL IMAGINATION OF THE LATE VICTORIANS* 4-10, 15-17 *passim* (1991) (discussing nineteenth century England social progress and concluding that, "whether [values] played a significant role in social affairs, the evidence is irrefutable").

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and defer gratification.¹¹² Advertising promotes self-indulgence by whetting appetites for material goods. In consumer cultures, conspicuous consumption earns not only personal pleasure but prestige. Extravagance is admired, frugality scorned. The dominant personality in capitalist democracies is Nietzsche's "last man," who is absorbed with petty self-gratification and eschews loftier goals.¹¹³ There are secular bases for deploring these attitudes, but the main opposition to materialism has always been religion.

Market economies stir up endless change. Schumpeter described capitalism as "creative destruction."¹¹⁴ Markets tend to reward socially desirable behavior, but they also depend on luck. When businesses fail, even capable employees may suffer lower income or unemployment. Religion can pacify displaced workers by preaching resignation to misfortune, but it can also inspire those who suffer bad luck or who have made mistakes to overcome difficulty. Religion can also fuel demands that government help the needy. By teaching that God helps those who help themselves,¹¹⁵ religion encourages the needy not to succumb to misfortune but to work their way out of it; and by preaching brotherly love, religion exhorts the fortunate to help the needy.

4. *Religion in public discourse*

Religion has pervaded political debate in America since the birth of the republic. The Declaration of Independence invokes "the Laws of Nature and of Nature's God" to justify freedom from England.¹¹⁶ It declares "unalienable Rights" of man, including "Life, Liberty and the pursuit of Happiness," which are "endowed by [the] Creator."¹¹⁷ The Civil War grew out of the

112. See DANIEL BELL, *THE CULTURAL CONTRADICTIONS OF CAPITALISM* 21, 54-80 (1976).

113. FRIEDRICH NIETZSCHE, *THUS SPAKE ZARATHUSTRA* 31-32 (Thomas Common trans., 1964).

114. JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 81-86 (3d ed. 1950) (describing the "process of creative destruction," which is described as "an essential fact about capitalism").

115. See *supra* text accompanying note 110.

116. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

117. *Id.* at para. 2. Further, "[t]here was nothing new . . . in what Jefferson said. All of the sentiments that Jefferson so eloquently expressed . . . were 'absolutely conventional among Americans of his time.'" Gordon S. Wood, *Dusting Off the*

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abolitionists' insistence that God abhorred slavery. Westward expansion was fueled by belief that God ordained a manifest destiny for America.¹¹⁸ Religion loomed large in public debate over Prohibition, civil rights,¹¹⁹ and American military involvement in Vietnam; it still features prominently in controversies over issues such as abortion.

Secularists reject religion in public debate because it is not based on fact and reason, but many great issues raise moral questions that transcend fact and reason.¹²⁰ Secular doctrines can offer moral answers, but they no more stand on fact and reason than religion does. Secularism thus has no claim of privilege over religion in the debate over norms. As Douglas Laycock says, the effort to banish religion from public debate is "a futile attempt at a coup d'état, in which secularists would get to silence everybody on the religious side of the spectrum."¹²¹

5. *Freedom and democracy*

Secularist attacks on religion as the enemy of freedom and democracy¹²² had a serious foundation but were flawed in two ways. First, some attacks exaggerated religion's hostility to freedom. For instance, the Church frequently defended the poor against oppression. Often the Church did not so much oppose freedom as surrender to political reality. When that reality became democracy, the Church accepted it, albeit slowly. But since Vatican II in the 1960s, the Catholic Church is more an impetus than an obstacle to freedom and democracy.

Second, Judeo-Christian theology does in fact offer support for freedom and justice. Before this century, secularists eschewed this support; they believed that democracy would

Declaration, N.Y. REV. BOOKS, Aug. 14, 1997, at 37, 39 (quoting PAULINE MAIER, *AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE* 135 (1997)).

118. John L. O'Sullivan, an influential nineteenth century American journalist and diplomat, referred to "our manifest destiny to overspread the continent allotted by Providence for the free development of our yearly multiplying millions." *Annexation*, 17 U.S. MAG. & DEMOCRATIC REV. 5 (1845), *quoted in* OXFORD DICTIONARY OF QUOTATIONS 502 (Angela Partington ed., 4th ed. 1992).

119. *See* CARTER, *supra* note 79, at 227-29 (describing the importance of religion in the civil rights movement).

120. *See infra* note 213 and accompanying text.

121. Douglas Laycock, *Freedom of Speech That Is Both Religious and Political*, 29 U.C. DAVIS L. REV. 793, 799 (1996).

122. *See supra* notes 6-29 and accompanying text.

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automatically protect human rights and that majorities would be benign. Marxists predicted political harmony once socialism showed the working class its unity of interests and eliminated the bourgeoisie. No modern idea is more revered than democracy; even the worst despots feel obliged to go through a charade of elections to claim legitimacy. But many popular governments persecuted individuals and minorities. Secular defenses of human rights that trump majority rule are possible, but because of their optimism, secularists never fully developed these justifications. More important, such justifications are hard to construct: in secular thought, what power or authority can exceed that of the people?

Religion, however, offers a clear basis for human rights—the “higher law” of God that transcends any civil law. Hebrew prophets invoked the higher law against unjust kings.¹²³ The apostles flouted orders not to preach, saying “[w]e ought to obey God rather than men.”¹²⁴ The Romans Polybius, Cicero, and Tacitus all asserted a higher, divine law.¹²⁵ The medieval Church accepted aristocracy and serfdom, but it always asserted the equality of all people before God. Catholic theologians like St. Thomas Aquinas preached resistance to rulers who violate God’s law.¹²⁶ The Puritans justified the deposition and execution of Charles I by divine law.¹²⁷ On trial for his role in that execution, John Bradshaw declared that “[r]ebellion to tyrants is obedience to God.”¹²⁸ The higher law of God was proclaimed by English philosophers like Locke and Algernon Sidney, who deeply influenced the drafters of the Declaration of Independence.¹²⁹ The defense of human rights

123. For examples of Hebrew kings rebuked by prophets for violating God’s laws, see *1 Kings* 13:1–14:16; *Jeremiah* 22:1–23:6; *Micah* 3.

124. *Acts* 5:29.

125. See, e.g., CICERO, ON THE COMMONWEALTH 215–16 (G. Sabine & S. Smith trans., 1976).

126. See St. Thomas Aquinas, *Of Seditious*, in THE POLITICAL IDEAS OF ST. THOMAS AQUINAS: REPRESENTATIVE SELECTIONS 92, 94–95 (Dino Bigongiari ed., 1953) (“Those . . . who defend the common good and withstand the seditious party are not themselves seditious . . .”).

127. See ELIZABETH SKERPAN, THE RHETORIC OF POLITICS IN THE ENGLISH REVOLUTION 1642–1660, at 95–96 (1992) (discussing the theories used to justify Charles’ deposition and execution).

128. Quoted in OXFORD BOOK OF QUOTATIONS 139 (Angela Partington ed., 4th ed. 1992).

129. See *supra* notes 74–76 and accompanying text.

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can be shorn of religious references, but in Western thought, religion is its primary source. Nonetheless, some secularists castigated religion as a threat to democracy.¹³⁰

6. *The decline of civic activism*

In recent years, Americans' involvement in public affairs has declined.¹³¹ Most Americans no longer even bother to perform the most basic function of a citizen in a democracy—to vote. The right to vote, once worth one's life, is no longer worth one's time. Declining civic activity is also manifest in the demise of private associations which mediate between individuals and society and whose abundance and vitality once amazed visitors to America.¹³² This decline has many repercussions. When democratic participation falls, demagoguery, political corruption, and incompetence grow. Although private groups provide social services, often more effectively than government does, and help integrate marginal citizens into the social fabric, the decay of government and political institutions aggravates human suffering and the isolation of outsiders.

Secularism is ill-equipped to combat this trend because in a secular cost-benefit analysis citizen indifference is "rational apathy;"¹³³ one vote rarely changes election results, so the material value of voting is less than its cost in time and effort. *A fortiori*, greater civic involvement is rarely cost-effective except for people or organizations that seek unique government benefits, such as government contracts or favorable regulatory action. As government expands, such special interests proliferate. As their influence grows, that of ordinary citizens shrinks. Thus ordinary citizens have a collective action problem that can be overcome only by a nonsecular commitment to civic activism.

130. American intellectuals have particularly vilified Catholicism. See, e.g., John T. McGreevy, *Thinking on One's Own: Catholicism in the American Intellectual Imagination, 1928–1960*, 84 J. AM. HIST. 97 (1997) (chronicling hostility towards Catholicism).

131. See Robert D. Putnam, *Bowling Alone: America's Declining Social Capital*, 6 J. DEMOCRACY 65, 67–70 (1995) ("By almost every measure, Americans' direct engagement in politics and government has fallen steadily and sharply over the last generation . . .").

132. De Tocqueville remarked on the innumerable private associations created to advance myriad causes. See DE TOCQUEVILLE, *supra* note 76, at 189–90.

133. See ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 260–74 (1957).

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The decline of civic activism does not stem primarily from secularist attacks on religion per se, but from the growth of secularist materialism, which elevates material consumption over civic activity, and from the expansion of the welfare state, which crowds out private charity.¹³⁴ "Liberalism thus becomes a self-fulfilling prophecy; a social order that is designed to work on the presumption that people are self-interested tends to produce that kind of people."¹³⁵ Reviving civic activity, then, may require increased religious commitment.

The modern career of civic virtue in particular began in the

Christian revival of the 16th and 17th centuries

. . . Cooperation with grace was manifest in the individual's development of a conviction of vocation, a calling to a specific sphere of worldly activity which could harmonize all aspects of one's life to serve the restoration of the Kingdom of God.¹³⁶

Public commitment need not stem from religion; nationalism, socialism, and other movements, including many alive in America today, have secular roots. But in liberal democracies, especially America, secular motives are weakening. Secular associations, like labor unions and fraternal societies, have deteriorated more than churches, and their decline would be even harder to reverse.

Religion now directly or indirectly motivates much civic activity.¹³⁷ Many churches educate parishioners about public issues and recruit them for public activities. Before the 1960s, traditional Christians and Jews rarely felt that government offended their faith, so they kept religion and politics separate. This has now changed. Legalized abortion and acceptance of homosexuality dismayed many believers. Rising government

134. See ALAN WOLFE, WHOSE KEEPER? SOCIAL SCIENCE AND MORAL OBLIGATION 52-60, 133-41 (1989) (arguing that growth of the welfare state and of materialism reduces civic activism).

135. STANLEY HAUERWAS, A COMMUNITY OF CHARACTER 79 (1981).

136. William M. Sullivan, *Reinstitutionalizing Virtue in Civil Society*, in SEEDBEDS OF VIRTUE: SOURCES OF COMPETENCE, CHARACTER, AND CITIZENSHIP IN AMERICAN SOCIETY 185-86 (Mary Ann Glendon & David Blankenhorn eds., 1995).

137. See Peter Steinfels, *Beliefs*, N.Y. TIMES, May 4, 1996, at A10 (referring to "studies showing that two-thirds of those people active in social movements were religiously motivated and that people active in churches and synagogues were more likely to vote and more likely to give time and money not only to religious causes but to secular charities as well").

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benefits were often withheld from religiously affiliated service providers and recipients.¹³⁸ Many social problems, like crime, drug abuse, and illegitimacy, grew worse because of moral faults that government ignored or actively abetted. Many religious people reacted by increasing their civic and political activities.¹³⁹ These activities extend far beyond those most publicized—like the civil rights, antiwar, and antiabortion movements. Most are local community endeavors such as soup kitchens, low-income housing renovation, and tutoring programs.

Religiously motivated political and civic action displeases secularists; witness their dismay at the remarkable rise of political activism among religious conservatives in America in recent years. There is, however, a consensus that America needs more citizen involvement in political and charitable activities.¹⁴⁰ If citizen activism is to revive, religion will have to play a major role. In short, churches now are not an obstacle but a spur to democratic government and republican commitment.

7. *Social cohesion and the sense of community*

Secularism condemns religion as divisive, but secular doctrines provide little basis for social cohesion. Liberal theory lauds individualism and economic competition. Socialism preaches cooperation but, at least in Marxism, cooperation rests only on class interests; sympathy for members of a different class is false consciousness—there can be no community with class enemies. More generally, concern for others is unscientific and contrary to rationalist, materialist theories.

The importance of community is now better appreciated, as indicated, however cloyingly, by *It Takes a Village*, the best-seller by first lady Hillary Clinton.¹⁴¹ Even children with two

138. See *infra* notes 226–28 and accompanying text.

139. See CARTER, *supra* note 79, at 58 (stating that secularism provoked political activism among the religious).

140. In 1997, President Clinton and other prominent American leaders convened a Summit on America's Future to encourage volunteer activity and make it more effective. See James Bennet, *At Volunteerism Rally, Leaders Paint Walls and a Picture*, N.Y. TIMES, Apr. 28, 1997, at A1.

141. For more serious treatments of the importance of community, see E.J. DIONNE, JR., *THEY ONLY LOOK DEAD: WHY PROGRESSIVES WILL DOMINATE THE NEXT POLITICAL ERA* 188–91 (1996); E.J. DIONNE, JR., *WHY AMERICANS HATE POLITICS* *passim* (1991); AMITAI ETZIONI, *THE NEW GOLDEN RULE: COMMUNITY AND MORALITY*

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caring parents and adequate income face tremendous risks if surrounded by drugs, crime, and people who scorn middle class norms.¹⁴² It does not take a village to raise a child—many children flourish in families isolated from other people—but a bad village can destroy a child. On the other hand, even children in dysfunctional homes can thrive if their neighbors live by traditional values. Adults, too, are influenced by their neighbors' attitudes toward work, crime, drugs, and family.

In nineteenth century England and America, significant social progress was achieved largely by private reform groups.¹⁴³ Government can also help, but its intervention is more problematic, especially at the national level. Unlike private groups, government cannot tailor aid to each recipient to cultivate personal responsibility and deter dependence on assistance. Government programs also crowd out private services by persuading donors and volunteers that their contributions are unneeded and by luring away recipients with no-strings-attached assistance.¹⁴⁴

Experience refutes the secularist charge that religion is divisive and obstructs the sense of community. In many countries, different sects have learned to coexist without conflict. Religion has pervaded many American political debates, but these debates rarely "generated . . . civil discord."¹⁴⁵ Rather in America, as de Toqueville perceived, religion encouraged the "sacrificing [of] private interests" for the sake of "God's plan."¹⁴⁶

IN A DEMOCRATIC SOCIETY *passim* (1996) (discussing the "core virtues" of a good society and a communitarian paradigm to achieve such a society); MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 201-49 (1996).

142. Cf. Fox Butterfield, *Study Links Violence Rate To Cohesion Of Community*, N.Y. TIMES, Aug. 17, 1997, at A11 ("The largest study ever undertaken of the causes of crime and delinquency has found that there are lower rates of violence in urban neighborhoods with a strong sense of community and values . . .").

143. See *supra* text accompanying note 111.

144. In 1987, a highly regarded church-run shelter for homeless men in Brooklyn, New York, closed for lack of clients, who went instead to a government shelter that did not forbid drug use or demand that they seek jobs or take job training. See Esther Iverem, *A Church in Brooklyn Closes its Men's Shelter*, N.Y. TIMES, Apr. 18, 1987, at 23.

145. Michael W. McConnell, *Political and Religious Disestablishment*, 1986 BYU L. REV. 405, 413; see also Michael E. Smith, *The Special Place of Religion in the Constitution*, 1983 SUP. CT. REV. 83, 97 (discussing "strong reasons" to believe "religion is [not] significantly more divisive than other sources of social discord").

146. DE TOQUEVILLE, *supra* note 76, at 529.

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Indeed, many American religious groups now cooperate with sects that they once oppugned.¹⁴⁷

In some regions, like the Balkans, religion still provokes friction, but the secularist remedy of privatizing religion is no panacea. Communist China destroyed Confucianism, but when Maoism itself was later discredited, there remained no bond to unify the people.¹⁴⁸ This century produced the two worst wars in history, but neither had much to do with religion.

As religious strife has subsided in America, social division has worsened along lines of wealth and race. The well-off fled cities for suburbs, thereby creating unprecedented economic segregation. Social rifts are deepened by multiculturalism, a theory that people should find meaning in their identity, which derives from sex, ethnicity, and sexual orientation. Multiculturalists deny that America has a common culture; its claimed heritage is just the culture of white, male heterosexuals who make the claim to shore up their political dominance.¹⁴⁹ The separatism fostered by multiculturalism corrodes all sense of community.¹⁵⁰

The vanishing sense of community diminishes trust¹⁵¹ and cooperation.¹⁵² Liberal secularism cannot foster or even explain

147. As recently as 1960, the presidential candidacy of John F. Kennedy, a Roman Catholic, troubled many Protestants. In the campaign for the 1996 Republican presidential nomination, however, the favorite candidate of fundamentalist Protestants was Pat Buchanan, a Catholic.

148. See Lucian W. Pye, *China's Quest for Respect*, N.Y. TIMES, Feb. 19, 1996, at A11.

149. Arthur Schlesinger calls multiculturalism a "cult of ethnicity" which promotes an "illusion that membership in one or another ethnic group is the basic American experience." ARTHUR M. SCHLESINGER, JR., *THE DISUNITING OF AMERICA* 118 (rev. ed. 1998). "The multiethnic dogma . . . replac[es] assimilation by fragmentation, integration by separatism. It belittles *unum* and glorifies *pluribus*." *Id.* at 21. He adds:

The ethnic revolt against the melting pot has reached the point, in rhetoric at least, though not I think in reality, of a denial of the idea of a common culture and a single society. If large numbers of people really accept this, the republic would be in serious trouble.

Id. at 140-41.

150. Multiculturalism fosters "identity absolutism" which posits a "world of many I's who form a we only with others exactly like themselves." JEAN BETHKE ELSHTAIN, *DEMOCRACY ON TRIAL* 66 (1995). Multiculturalism also contradicts the traditional universalism of the Left. See *supra* notes 105-07.

151. See FRANCIS FUKUYAMA, *TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY* 310 (1995).

152. See *id.* at 26-28.

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trust because it disregards the moral duties to others (such as respect and honesty) on which trust depends. Because democratic governments reflect the antagonisms of voters, they lack the means and the will to inspire community. Indeed, in liberal theory government is the arena in which interest groups battle; self-seeking is rewarded. Combatants may reach truces, but at bottom it is antagonism, rather than community and cooperation, that remains.

American churches are not models of social harmony, but they are less fragmented than most institutions, and their missions nurture fellowship as other organizations do not. The idea of community is integral to most religions, including Judaism, Islam, and Christianity; it stems from belief that all are made in God's image.¹⁵³ Christian condemnation of racism begins with Jesus' parable of the Good Samaritan, who helped a Levite beaten by robbers even though the Levites often mistreated the Samaritans.¹⁵⁴ As Saint Paul said, "[W]hether one member suffer, all the members suffer with it; or one member be honoured, all the members rejoice with it."¹⁵⁵

Accordingly, religious leaders are prominent in preaching the idea of community. Believers, like secularists, disagree about how best to help the needy. Liberal believers support government entitlements while conservative believers favor measures (preferably private, not governmental) to nurture individual responsibility. But their dispute concerns means, not ends; both sides care about the needy because their faith demands that they care. Secular ideals alone cannot generate the sense of community necessary to heal our deepening social rifts and lift up the needy.¹⁵⁶ If the job is to be done, religion must play a prominent role.

153. See Don S. Browning, *Altruism, Civic Virtue, and Religion*, in *SEEDBEDS OF VIRTUE: SOURCES OF COMPETENCE, CHARACTER, AND CITIZENSHIP IN AMERICAN SOCIETY* 122-26 (Mary Ann Glendon & David Blankenhorn eds., 1995).

154. See *Luke* 10:30-37.

155. *1 Corinthians* 12:26.

156. See John Keane, *The Limits of Secularism*, *TIMES LITERARY SUPP.*, Jan. 9, 1998, at 12-13 (arguing that secularism may be increasing intolerance in liberal democracies).

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8. *Utilitarianism, pragmatism and religion*

The utilitarian and pragmatist assaults on religion¹⁵⁷ flunk their own tests. Religion does not hinder but enhances economic growth and human freedom and happiness, the goals of utilitarian theory. In pragmatic terms, religion is useful. Pragmatists deny eternal truths and seize whatever works in a particular time and place. They could, therefore, simply revise their formulas for social progress to factor in the utility of some religious beliefs in contemporary America. They could still regard religion as superstition but welcome it because it “works.”

This revision may be impractical, however. Religion professes eternal truth; it cannot be marketed as truth that varies by time and place. Further, utilitarianism and pragmatism posit no universal purpose for individual lives or for society; every person is the best judge of her own interests, and society exists simply to maximize the aggregate satisfaction of individuals. Widespread self-destructiveness shows, however, that many people are not the best judges of their own interests. Also, to live in a just and moral society with virtuous citizens is important for many people. Utilitarianism and pragmatism cannot address this desire because they have no theory of virtue, justice, or morality; indeed, they disdain such ideas as metaphysical nonsense.

The experience of this century also discredits moral relativism. Decent people cannot eschew moral judgment of the evils of Stalin, Hitler, Mao, and countless lesser tyrants. The degradation of poverty, drug abuse, and neglected children also forced many to abandon moral neutrality about the policies and behavior that breed such misery. Once the need for moral judgment is acknowledged, respect for religion as a source of morality grows.

C. Private Morality and the Family

Secular optimism about human nature and social progress crumbled in the face of the catastrophes of this century. Progress might still be possible, but it would be slower and harder to achieve than optimistic secularists had thought. Moreover,

157. See *supra* text accompanying notes 51–54.

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the path to progress was not clearly marked; the worst atrocities were perpetrated by regimes born of utopian plans. Liberal democracies avoided the worst enormities but still face serious social problems, some of which are deepening, including crime, drug abuse, and child neglect and abuse. Moreover, the countries that have achieved the greatest wealth and freedom suffer from spiritual malaise. Their middle class majorities have avoided the pathology of the underclass but seem mired in squalid values of selfishness and material consumption. For many, the solution to these problems seems to lie in morality and religion.

1. The importance of individual morality

Secular optimism held that people are naturally good, so society can be perfected quite easily. All that is needed is good ideology—the right social recipe would extirpate the ills of the (religious) past and liberate innate human goodness. Marxists promised not just a new social order but a new human being,¹⁵⁸ the Bolsheviks proclaimed the new Soviet man,¹⁵⁹ and the Nazis announced a golden age of the “master race.”¹⁶⁰

The disasters of this century discredited not only grandiose social planning but also optimism about human nature. Especially painful was the willing complicity of innumerable underlings in mass murder. Some were psychopaths, but many were ordinary people just doing their jobs, following orders, or even volunteering enthusiastically.¹⁶¹ So striking was this phenomenon that it acquired a name conferred by Hannah

158. Marx said communism would liberate man from specialization, so that it would be “possible for me to do one thing today and another tomorrow, to hunt in the morning, fish in the afternoon, rear cattle in the evening, criticise after dinner.” KARL MARX & FREDERICK ENGELS, *THE GERMAN IDEOLOGY* 45 (S. Ryazanskaya ed., Progress Publ. 1968); see also ERICH FROMM, *MARX’S CONCEPT OF MAN* 4–5, 38–43 (1961) (describing Marx’s “prophetic Messianism” to liberate man).

159. See ORLANDO FIGES, *A PEOPLE’S TRAGEDY: A HISTORY OF THE RUSSIAN REVOLUTION* 733 (1997) (“[T]he ultimate aim of the Communist system was the transformation of human nature.”).

160. See DAVID WELCH, *THE THIRD REICH: POLITICS AND PROPAGANDA* 65–68 (1993) (describing Nazi theories of race and the master race).

161. See DANIEL JONAH GOLDHAGEN, *HITLER’S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST* 9, 166–68, 379–81, 525–26 n.13, 578 n.5 (1996) (showing that over 100,000 Germans, and probably far more, helped to exterminate Jews, even though they could have refused without risking death or severe punishment).

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Arendt—"The Banality of Evil."¹⁶² Nor was brutality limited to citizens of totalitarian regimes. In psychological studies, most citizens of supposedly enlightened democracies proved willing to torment innocent subjects simply because the experiment's functionaries told them to do so.¹⁶³ Barbarity, we now realize, is easily contracted and highly contagious; society must work hard to prevent its outbreak.

Liberal democracies avoided mass murder but failed to breed the saints that secular optimists predicted. Instead, these countries (especially America) are suffering an upsurge of anti-social conduct, including crime, drug abuse, and child abuse and neglect. People now care less about others and realize that others care less about them. Alienation, a central theme of modern art and literature, has spread from intellectuals to the general population.¹⁶⁴ It is now obvious that virtue does not blossom spontaneously but must be carefully cultivated. The demise of optimism does not always lead to religious conversion. Sartre declared that "[h]ell is—other people!"¹⁶⁵ But Sartre remained a strident atheist. For some, modern calamities shattered religious faith; pandemic savagery seemed to mock belief in a just and loving God. Others, however, imputed barbarity to lack of faith. Many believe that secularists, like the builders of the Tower of Babel,¹⁶⁶ arrogantly spurned God and constructed new societies as monuments to themselves. In so doing, they intentionally and unintentionally destroyed millions of lives.

Some also attribute the disorder and spiritual squalor of liberal democracies to the decline of religion. By discrediting free will and ascribing all evil to social forces,¹⁶⁷ secularism created a "no-fault" mentality that rejects any moral criticism of individual misconduct. Guilt and shame are not considered

162. HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* (rev. ed. 1963) (quoting the book's subtitle).

163. See Janice T. Gibson, *Training People to Inflict Pain: State Terror and Social Learning*, J. HUM. PSYCHOL., Spring 1991, at 72, 74 (summarizing studies in which most subjects obeyed instructions of clinicians to impose what they were told was dangerously high shock in simulated experiments).

164. See THOMAS F. O'DEA, *ALIENATION, ATHEISM AND THE RELIGIOUS CRISIS* 178–81 (1969) (describing the spread of alienation in modern societies); see also *supra* text accompanying notes 105–07 (discussing the spread of nihilism).

165. JEAN-PAUL SARTRE, *No Exit*, in *NO EXIT AND THREE OTHER PLAYS* 45 (1989).

166. See *Genesis* 11:1–9.

167. See *supra* notes 37–39 and accompanying text.

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by secularists as necessary and proper emotions but curable mental ailments. The real problem is not individual fault but its opposite, low self-esteem. The correct attitude is "I'm OK, you're OK."¹⁶⁸ People are not encouraged to achieve in order to feel good about themselves, but to feel good about themselves *in order to achieve*. This attitude now faces growing criticism. Many psychologists deny that nourishing self-esteem improves achievement.¹⁶⁹ Rather, denial of personal responsibility removes a crucial social constraint and thereby abets misconduct.¹⁷⁰

The liberal axiom that each person is the best judge of his own interests¹⁷¹ is increasingly questioned. The benefits of education and of abstention from drugs, crime, and bearing illegitimate children are obvious even to people who spurn those benefits, but either they lack the self-discipline to delay gratification or they recognize the consequences of their actions too late. Then they grieve and wish that others had set them right. Secularist doctrine prevents such intervention, however, by subverting religious morality and the institutions that nurture it and by decrying the very idea that anyone should impose his morals on others.

Optimistic secularists believed that innate goodness, secular education, material self-interest, and criminal laws would induce good behavior.¹⁷² In a society steeped in traditional morals, the contempt of a few secularists for religion and bourgeois morality would matter little. But when the traditional morals weaken, as in contemporary America, vice spreads; the defenses relied upon by secularists are too thin. The moral benefit of secular education has been sapped by the values clarification movement, which now reigns in American public schools. This movement not only despises traditional morality

168. See THOMAS A. HARRIS, I'M OK YOU'RE OK: A PRACTICAL GUIDE TO TRANSACTIONAL ANALYSIS (1969) (searching "to find answers for people who are looking for hard facts . . . about how the mind operates, why we do what we do, and how we can stop doing what we do if we wish").

169. See Joseph Adelson, *Down With Self-Esteem*, COMMENTARY, Feb. 1996, at 34, 37-38.

170. See ANDREW DELBANCO, THE DEATH OF SATAN: HOW AMERICANS HAVE LOST THE SENSE OF EVIL 153, 168-80, 186-217, 234-35 (1995) (describing America's loss of a sense of sin and the transformation of the concept of evil).

171. See *supra* note 71 and accompanying text.

172. See *supra* notes 30-33, 48-50 and accompanying text.

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but exhorts children to follow the norms with which they feel comfortable.¹⁷³

Moral decay infects slowly. Many people stick to bourgeois morality even after they cease to believe in it. Society lives off the moral capital accumulated by religion even after religion declines. In time, however, this moral capital is spent, and more people abandon education, work, frugality, and sobriety. Deferring gratification is no longer acceptable: the cry is “WE WANT THE WORLD AND WE WANT IT NOW!”¹⁷⁴ Cass Sunstein said, “[e]xisting social conditions are often more fragile than might be supposed, because they depend on social norms to which—and this is the key point—people may not have much allegiance.”¹⁷⁵

The decline of religion is not the only cause of social problems; these problems are smaller in many European nations where religion is weaker than in America. But America lacks restraints these other nations possess. Because Americans are so ethnically diverse, nomadic, and individualistic, the disapproval of one’s neighbors counts less here. To induce virtue requires both conscience—the inner sense of morality and responsibility—and social pressure; *i.e.*, shame and guilt.¹⁷⁶ This is borne out by comparing illegitimacy rates in Japan and America. Both are wealthy, industrialized, urban societies that offer welfare to single mothers, yet in Japan only 1.1% of births are illegitimate; in America the rate is 30.1%. In explaining the difference, “the most important factor is social pressure. Single mothers face economic and social discrimination. In Japan, having a baby without being married is still a humiliation.”¹⁷⁷

173. See LAWRENCE KOHLBERG, *Indoctrination Versus Relativity in Value Education*, in I ESSAYS ON MORAL DEVELOPMENT: THE PHILOSOPHY OF MORAL DEVELOPMENT 6, 10–12 (1981).

174. Jim Morrison, *When the Music’s Over* (1967), quoted in OXFORD DICTIONARY OF QUOTATIONS 486 (Angela Partington ed., 4th ed. 1992).

175. Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 909 (1996).

176. See, e.g., STUART SCHNEIDERMAN, *SAVING FACE: AMERICA AND THE POLITICS OF SHAME* 24–28 (1996). Guilt springs from an internal moral sense while shame stems from social condemnation. Although the two are different, religion induces both, so they can be coupled for purposes of this discussion.

177. Sheryl WuDunn, *Stigma Curtails Single Motherhood in Japan*, N.Y. TIMES, Mar. 13, 1996, at A1. Further, “even unwed [Japanese] mothers prefer to find work and day care rather than go on welfare, and the result is that less than 7 percent

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When individual morality and social censure atrophy, other forces cannot deter disorder. Capitalism rewards good behavior but only after a long wait—too long for those who lack the middle class value of deferring gratification. Nor is criminal law an adequate deterrent. America inflicts unusually long jail terms on huge numbers of criminals at immense expense and executes far more criminals than other democracies, yet crime rages unabated.¹⁷⁸ Undue reliance on criminal law necessitates government invasion of civil liberties long revered in America. Experience with Prohibition and with antidrug laws today shows that criminal law cannot curb acts that many people do not consider immoral. Further, criminal laws do not curb misconduct that are not crimes, such as failure to work or to care for one's children.

Secular beliefs can nurture conscience, but in the West, conscience is traditionally rooted in religion. Most people who resisted the Nazis, for example, were motivated by faith.¹⁷⁹ Conscience is reinforced by social pressure; people fear the censure of their neighbors. Social attitudes also traditionally grow out of religion—people condemn what their religion tells them is wrong. Thus religion may be essential to restoring moral capital or, as Gertrude Himmelfarb puts it, “re-moralizing society.”¹⁸⁰ Religion instills morality directly by preaching traditional values¹⁸¹ and indirectly by shoring up institutions (such as law, education, and the family) that foster these values.

To value morality is not to deprecate material concerns. Poverty and poor schools, health care, and job opportunities also influence behavior, but their role seems to be secondary. In society generally, misconduct does not vary with changes in the economy.¹⁸² The success of social groups in America mirrors

of single-parent households [in Japan] receive benefits.” *Id.*

178. See CRIME, COMMUNITIES, AND PUBLIC POLICY 2–5 (Lawrence B. Joseph ed., 1995) (describing increasing criminal penalties and rates of incarceration).

179. See DAVID P. GUSHEE, THE RIGHTEOUS GENTILES OF THE HOLOCAUST: A CHRISTIAN INTERPRETATION 99–100, 129–48 (1994).

180. GERTRUDE HIMMELFARB, THE DE-MORALIZATION OF SOCIETY: FROM VICTORIAN VIRTUES TO MODERN VALUES 246–48, 256–57 (1995).

181. Thus faith-based programs are often particularly effective in influencing individual behavior. See *infra* note 288.

182. See JAMES Q. WILSON & RICHARD J. HERRNSTEIN, CRIME AND HUMAN NATURE 312–36, 423–24, 436–38 (1985) (stating that crime rates have little correlation with economic cycles); James Lardner, *Can You Believe the New York Miracle*, N.Y. REV.

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each group's dominant norms more than its material condition. Thus immigrant groups often fare better than native-born groups that are wealthier.¹⁸³ Individual material success correlates more closely with attitudes learned and attention received from parents than with one's material circumstances in childhood.¹⁸⁴ Moreover, government spending often has little effect on social problems. Spending on public schools, for example, has virtually no correlation with students' learning.¹⁸⁵

Secularist hostility to religious morality harmonized with the liberal creed of minimal government: "The best government is that which governs least."¹⁸⁶ Liberals believed government should prohibit acts that harm others, but otherwise it should endorse no moral code. To this end, religion should be relegated to private life and excluded from law and politics. Across the American political spectrum, minimal government is now generally opposed, and government support for certain values is favored. Although there is disagreement about which values to espouse and how to advance them, the consensus in favor of government promoting certain morals dictates a less hostile stance toward our principal source of values—religion.

2. *The importance of the family in instilling morality.*

Habits and morals are learned in part from those outside the home—teachers, schoolmates, daycare workers, clergy, and neighbors. But the primary transmitters of values are the adults with whom a child lives. These adults need not be the child's parents, or even relatives, to do a good job. However, to raise children well, much personal time and attention is

BOOKS, Aug. 14, 1997, at 54 ("[T]he correlation between crime and the economy has never been close.").

183. See THOMAS SOWELL, *RACE AND CULTURE* 82–83 (1994).

184. See SUSAN MAYER, *WHAT MONEY CAN'T BUY* (1997) (concluding that parents' characteristics are more important than their income in determining how well they raise their children and, hence, how well their children will do in later life); Nathan Caplan et al., *Indochinese Refugee Families and Academic Achievement*, *SCI. AM.*, Feb. 1992, at 36, 39–42 (describing studies showing that scholastic performance correlates with family support and values, not wealth).

185. See Eric A. Hanushek, *The Economics of Schooling: Production and Efficiency in Public Schools*, 24 *J. ECON. LITERATURE* 1141 (1986) (study showing no correlation between school spending and student achievement).

186. John L. O'Sullivan, *Introduction to U.S. MAG. & DEMOCRATIC REV.* (1837), quoted in *OXFORD DICTIONARY OF QUOTATIONS* 502 (Angela Partington ed., 4th ed. 1992).

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required. Even in the best circumstances, like Israeli kibbutzim, communal child care is inferior to individual care by committed adults.¹⁸⁷ And, though strangers can provide effective individual care, such care is more likely to come from parents or close relatives or someone who has direct control of the child.

A lone parent can give this care, but in most families at least one parent must work. It is difficult for one parent to earn a living, do daily errands, and also give all the attention children need. This is especially true when, as in many single-parent families, the parent lacks education and parenting skills and neighbors provide poor role models for the child. Moreover, mothers and fathers usually make distinct contributions in raising children. It is hard for one parent to fill both roles. Not surprisingly, many problems afflicting children—crime, drug abuse, poor school performance, and low income in later life—are much rarer in two-parent families.¹⁸⁸ The wider the departure from the intact two-parent family, the deeper the problems. Thus with divorced parents, problems are greater when one parent has little contact with the child, and problems are greatest when the parents never married.¹⁸⁹ Government can do more than it does now to help broken families and to prevent child abuse and neglect, but it can never take the place of two committed parents.

Secularists criticized the family for breeding indifference or hostility to strangers. It now appears that families actually

187. See BRUNO BETTELHEIM, *THE CHILDREN OF THE DREAM* 61 (1969) (concluding that communal child rearing on kibbutzim was “not entirely successful . . . at least not from our point of view”); see also *id.* at 240–43, 251–55, 310–11.

188. Sara McLanahan and Gary Sindefur argue that:

Children who grow up in a household with only one biological parent are worse off, on average, than children who grow up in a household with both of their biological parents, regardless of the parents’ race, regardless of whether the parents are married when the child is born, and regardless of whether the resident parent remarries.

SARA McLANAHAN AND GARY SINDEFUR, *GROWING UP WITH A SINGLE PARENT* 1 (1994); see also, e.g., William A. Galston, *Divorce American Style*, PUB. INTEREST, Summer 1996, at 12, 14–15 (finding that divorce causes damage to children independent of income losses after divorce and intrafamily conflicts before divorce).

189. See DAVID POPENOE, *LIFE WITHOUT FATHER* 52–64 (1996) (describing detriments to children of divorce and illegitimacy); Lingxin Hao, *Family Structure, Private Transfers, and the Economic Well-Being of Families with Children*, SOC. FORCES, Sept. 1996, at 1, 269, 281–86 (discussing the effects of economic conditions of children in two-parent, single-divorced parent, and never-married parent households).

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enhance concern for outsiders.¹⁹⁰ Children first learn to care for others within the family. Once altruism develops, it can expand to outsiders. If not planted in the family, however, the seed may never sprout. In individual moral development as in politics,¹⁹¹ secularists overrated reason and undervalued habit. They posited that people learn certain norms by formal instruction and then conform their behavior to these norms. Psychologists now realize, as did the ancient Greeks, that this is backwards.¹⁹² Children acquire virtue from discipline, habit, and the example of adults. Only later may they learn formal rationales for the norms they have assimilated.¹⁹³ Therefore, moral education cannot be left to schools. Schools teach by instruction, not by example, and children do not begin school until the age of five or six. Children must learn virtue in the family, and that requires society to nurture the institution of the family.

3. *The fragility of the two-parent family*

The two-parent family cannot thrive without society's support.¹⁹⁴ This truth was forgotten when rates of illegitimacy, divorce, and desertion were so low that the intact two-parent family seemed natural. Now that these rates have soared, it is obvious that many parents do not readily become or remain married. This is especially true for the parent who earns more

190. See, e.g., Browning, *supra* note 153, at 105.

191. See *supra* notes 93–95 and accompanying text.

192. See PAUL CRITTENDEN, *LEARNING TO BE MORAL: PHILOSOPHICAL THOUGHTS AND MORAL DEVELOPMENT* 113 (1990) (describing Aristotle's concept of moral education as "habit-formation, in keeping with the idea that in education practice goes before theory. . . . The insistence on the need for habituation as the prerequisite for instruction and understanding in morality is a recurrent theme in Aristotle's writings."); WILLARD GAYLIN & BRUCE JENNINGS, *THE PERVERSION OF AUTONOMY: THE PROPER USE OF COERCION AND CONSTRAINTS IN A LIBERAL SOCIETY* 116–19 (1996).

193. See WILLIAM DAMON, *THE MORAL CHILD: NURTURING CHILDREN'S NATURAL MORAL GROWTH* 118 (1988) (noting that children acquire moral values by practice and experience, and that "[c]hildren's morality is little affected by lessons or lectures"); see also JAMES Q. WILSON, *THE MORAL SENSE* 249 (1993) ("[A] moral life is perfected by practice more than by precept; children are not taught so much as habituated.").

194. See Alan Wolfe, *Social and Natural Ecologies: Similarities and Differences*, in *SEEDBEDS OF VIRTUE: SOURCES OF COMPETENCE, CHARACTER, AND CITIZENSHIP IN AMERICAN SOCIETY* 163, 168–70 (Mary Ann Glendon & David Blankenhorn eds., 1995) (discussing the fragility of social institutions, including the family, and that "society has as much an interest in strengthening its social institutions as it does in protecting its natural environment").

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money and therefore finds marriage financially as well as emotionally burdensome. Most unmarried fathers do not live with their children and cannot give them daily care. Absent fathers also pay far less child support than fathers present in the home.¹⁹⁵

Many factors influence the creation and stability of marriages. One is the economy, though its effects are complex.¹⁹⁶ Mothers' working outside the home is also an influence. If good jobs are economically and socially feasible for mothers, they have less incentive to enter into or remain in flawed marriages.

The law can do more than it now does to encourage contact with and support from absent parents, but it cannot compel diligent work for wages or parental love and care. Most fathers care for their children not because of animal instincts or legal threats but because of feelings of spiritual fulfillment and of moral duty buttressed by social pressure. Thus, even in wealthy nations, rates of illegitimacy and divorce vary widely because of divergent social attitudes.¹⁹⁷ Since the 1960s, the stigma of divorce and illegitimacy in America has collapsed under secularist attack, and the problems of children living apart from one or both parents have exploded. The desire to free adults from this stigma and from unhappy marriages is understandable, but this trend also makes it easier for selfish parents to neglect or abandon their children.

Religion has always encouraged parental responsibility by instilling conscience—telling parents it is a sin to abandon their children. Religion also supports social attitudes that foster parental commitment—both respect for conscientious parents and condemnation for derelict parents. Not surprisingly, then, religious people are less likely than others to divorce and more likely to marry and preserve intact families.¹⁹⁸

195. Despite increased government efforts to enforce child support awards, custodial parents collect less than 20 percent of the child support they are owed. See Adam Clymer, *Child-Support Collection Net Usually Fails*, N.Y. TIMES, July 17, 1997, at A8.

196. A weak economy hurts the family when one spouse cannot find decent work and therefore leaves or is left by his or her mate. A strong economy can also undermine the family, though; a person is less likely to endure an unhappy marriage if the economy is so strong that he or she can survive without his or her spouse.

197. See *supra* note 177 and accompanying text.

198. See CAROL TAVRIS & SUSAN SADD, THE REDBOOK REPORT ON FEMALE SEXUALITY 98-99 (1977) (asserting that religiosity is the most important predictor of

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Even intact families may fail in a hostile society. Families now “are under insurmountable pressures from a culture that undermines child-rearing efforts.”¹⁹⁹ Our society exposes children to malign influences and sabotages parental authority, especially in the public schools.²⁰⁰ Parental authority rests in part on religious belief, such as the Biblical commandment to honor one’s parents.²⁰¹ For child-rearing to improve, then, the intact family and parental authority must be bolstered. To accomplish this, greater respect for religion is desirable and necessary.

4. *Marriage and love*

Secularist criticism of the effects of marriage on couples has also been reevaluated. Most Christian and Jewish denominations now deny that husbands govern wives. To answer the pronouncement in Genesis that husbands shall “rule over” wives,²⁰² some quote St. Paul’s Epistle to the Ephesians: “Submit[] yourselves one to another. . . Husbands, love your wives, even as Christ also loved the Church, and gave himself for it”²⁰³

The preference of secularist libertarians for contract over status as a basis for social relationships²⁰⁴ makes sense in some areas, but not in the family. No contract can specify all obligations between wife and husband, and no court could enforce any attempt at such a contract. A contract model of marriage also slights children, who are not parties to the contract and lack standing to enforce it or to resist its rescission. Successful marriages are based on caring, trust, and spiritual (not material) gratification. Treating marriage as a contract demeans these

marital stability); Howard M. Bahr & Bruce A. Chadwick, *Religion and Family in Middletown, USA*, 47 J. MARRIAGE & FAM. 407, 410–12 (1985) (statistical study).

199. DANA MACK, *THE ASSAULT ON PARENTHOOD: HOW OUR CULTURE UNDERMINES THE FAMILY* 16 (1997).

200. *See id.* at 109–48.

201. *See Exodus* 20:12.

202. *Genesis* 3:16; *see supra* note 65 and accompanying text.

203. *Ephesians* 5:21, 25; *see also* Browning, *supra* note 153, at 122 (describing attitude of one church toward husbands’ role). Even traditionalist religious groups like the Promise Keepers insist that the husband-father’s biblically-ordained role as head of the family means not being a tyrant, but accepting responsibility for the care of the family. *See* Gustav Niebuhr, *Men Crowd Stadiums to Fill Their Souls*, N.Y. TIMES, Aug. 6, 1995, § 1, at 1.

204. *See supra* text accompanying note 67.

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values. To make matters worse, current law grants divorce without fault and without sanction for the marriage breaker; the only remedy in no-fault divorce is support based solely on financial need. This rewards selfishness—the materially optimal strategy is to take the most from and give the least to one's spouse, then leave for greener pastures.

Despite feminist denunciations of marriage as sexist and patriarchal, the breakdown of the family injures women and children most. It is no longer taboo for a successful man to divorce the wife who aided him and cared for their children during his rise and then to snatch a younger trophy wife; he need only pay support, usually quite limited in amount and time, for his children and first wife. The wife's altruism proves foolhardy; because of it, she lacks marketable skills and may be relegated to a menial job rather than sharing the success which she helped her husband create. A man can also be a victim. Regardless of his innocence in divorce, the wife usually gets the home and custody of the children. He must still support them even if this prevents him financially from starting a new family.

Religious attitudes about romantic love in marriage have changed. Nearly all Jewish and Christian branches now consider love important, if not essential, to marriage. Although some sects limit contraception, few condemn sexual pleasure, which is hailed as a gift from God. Religion, then, no longer condemns romantic love but defends it against secularists who disparage romance as a sexist myth to dupe women. The secularist critique of monogamy as emotionally and sexually stifling has retreated before an understanding of marriage—the best medium for sexual and emotional fulfillment. Married people report greater sexual satisfaction and overall happiness and exhibit signs of better lives (such as lower mortality and better health) than the unmarried.²⁰⁵

Secular explanations of these facts are possible. Bernard Shaw, an atheist, said “[m]arriage is popular because it com-

205. See DAVID B. LARSON & SUSAN S. LARSON, THE FORGOTTEN FACTOR IN PHYSICAL AND MENTAL HEALTH: WHAT DOES THE RESEARCH SHOW? 76 (1994); Harsha N. Mookherjee, *Effects of Religiosity and Selected Variables on the Perception of Well-Being*, 134 J. SOC. PSYCHOL. 403 (1994) (reporting results of national survey); David R. Williams et al., *Religion and Psychological Distress in a Community Sample*, 32 SOC. SCI. & MED. 1257 (1991).

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bins the maximum of temptation with the maximum of opportunity.”²⁰⁶ But science and reason cannot explain love except by reducing it to sex, as Shaw’s maxim suggests, or to an evolutionary strategy for propagating one’s own genes. Most people see love as spiritual, however, and view love as central to religion. The Bible says “God is love”²⁰⁷ and declares His love of humanity.²⁰⁸ Jews and Christians are enjoined to “love thy neighbour as thyself.”²⁰⁹ Religion, then, is important to any treatment of love as more than a political charade or a biological reflex.

5. *Morality and the meaning of life*

Ironically, material progress in modern times has not dampened, but whetted, the search for a metaphysical meaning of life. The mere struggle for survival once left most people no time or energy to ponder or pursue higher purposes. Liberal democracies extended freedom and material comfort to millions. Physical pleasure, material consumption, intellectual pursuits, and the arts satisfy some, but for many, these pleasures proved inadequate, leaving an emotional void and a yearn to find a transcendent meaning to life. Many not only seek deeper meaning for themselves but lament spiritual emptiness in others; to many, a life devoted solely to material pleasure—sex, drugs and rock and roll,²¹⁰ in one formulation—is contemptible. State endorsement of any spiritual meaning of life violates the secularist demand that everyone choose her own life plan without interference from others,²¹¹ but this demand has never been honored. Despite the values clarification movement,²¹² for instance, public schools widely preach certain moral values, such as the evils of sexism, racism, drugs, and violence. Thus, for

206. BERNARD SHAW, *MAN AND SUPERMAN: A COMEDY AND A PHILOSOPHY* 231 (1903).

207. *1 John* 4:8.

208. “For God so loved the world, that he gave His only begotten Son, that whosoever believeth in him should not perish, but have everlasting life.” *John* 3:16.

209. *Leviticus* 19:18; *see also Matthew* 19:19.

210. This is the title of a song by Ian Dury. *See OXFORD DICTIONARY OF QUOTATIONS* 264 (Angela Partington ed., 4th ed. 1992).

211. *See supra* note 21.

212. *See supra* note 173 and accompanying text.

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government to affirm the idea of a spiritual purpose to life would be neither unprecedented nor improper.

Secularist discourse welcomes only fact and reason, but fact and reason cannot generate a purpose of life or moral values, including freedom, democracy, civic involvement, and belief in community, love, and family.²¹³ Some moral norms—education, work, sobriety, thrift, and obedience to law—serve material self-interest, but this incentive is too weak to motivate some people. Science measures only the material side of human existence, such as physical pleasure and subjective reports of satisfaction. Few secularists define happiness as limited to these components, but by disparaging or slighting the spiritual, they leave nothing else. Many secularists indicted religion as a primary cause of human misery, but philosophers like Nietzsche and Kierkegaard realized that secularism itself leads easily to the misery of nihilism—a despairing belief that life is meaningless.²¹⁴

Some find meaning in secular callings, but for many, religion is the alternative to the abyss. For Christians and Jews, hope is not merely permitted but mandated. Hope is a cardinal virtue; despair and its companion, suicide, are deadly sins. Each believer belongs to the community of the faithful—his presence and participation are valued. Daily duties like work and caring for spouse and children are infused with purpose and so cease to be drudgery. Psychology attests the importance of a sense of purpose and belonging to human well-being.²¹⁵ Sci-

213. See ALLAN BLOOM, *THE CLOSING OF THE AMERICAN MIND* 194 (1987) ("Reason cannot establish values, and its belief that it can is the stupidest and most pernicious illusion."); Larry Alexander, *Liberalism, Religion, and the Unity of Epistemology*, 30 SAN DIEGO L. REV. 763, Part III (1993) (arguing that "liberalism cannot make out its case for excluding religious arguments from shaping public policy"). The idea that facts can generate norms was derided as the "naturalistic fallacy" by philosopher G.E. Moore. See 3 *ENCYCLOPEDIA OF PHILOSOPHY*, *supra* note 21, at 69–71 (describing ethical naturalism and its critics).

214. See BLOOM, *supra* note 213, at 195–99 (describing Nietzsche's views); DAVID J. GOUWENS, *KIERKEGAARD AS RELIGIOUS THINKER* 80 (1996) (discussing Kierkegaard's concept of despair as failure to relate the self to God); RALPH HARPER, *THE SEVENTH SOLITUDE: MAN'S ISOLATION IN KIERKEGAARD, DOSTOEVSKY, AND NIETZSCHE* 1–5 *passim* (1965); TED SADLER, *NIETZSCHE: TRUTH AND REDEMPTION* 110 (1995) (discussing Nietzsche's concept of passive nihilism, "a resigned and demoralized submission to the devaluation of values"); see also *supra* text accompanying notes 105–07 (nihilism stemming from the failure of socialism) and 164 (alienation in modern life).

215. See Carol D. Ryff & Corey Lee M. Keyes, *The Structure of Psychological Well-Being Revisited*, 69 J. PERSONALITY & SOC. PSYCHOL. 719, 720 (1995) (discussing

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ence may slight theology, but it confirms the earthly power of religion. As Pascal said, by believing in God one “will gain even in this life.”²¹⁶ Unfortunately, when traditional religion is marginalized, some turn to cults, often with disastrous effect.²¹⁷

Although Americans disagree on many moral questions, there is a consensus on a “thin” or “minimalist” morality.²¹⁸ At the least, virtually all Americans agree that violence, drug abuse, child abuse and neglect, poverty, racial hostility, and civic apathy are bad; education, work, and civic commitment are good. It should be possible, then, to forge a consensus in favor of values that combat these evils and promote the good. Fact and reason cannot generate values, which must rest on faith. Faith need not be religious, but it must come from a realm beyond reason. Confucianism, for example, is not a religion, but before the Communist revolution, it was the moral and ethical philosophy of China much as Christianity has been for Europe.²¹⁹ The West has produced secular moral codes, some of which resemble Christian morality. Kant’s categorical imperative,²²⁰ for example, harmonizes with Christ’s command to “do unto others as you would have them do unto you.”²²¹ But in the West, secular-based moral exhortations have been less effective than religious exhortations.²²² This reflects both the

elements of wellness, including “Positive Relations With Others” and “Purpose in Life”); *see also supra* text accompanying notes 90–91 (noting the benefits of prayer to recovery from sickness and injury).

216. BLAISE PASCAL, *PENSÉES* 153 (A.J. Krailshiemer trans., 1966).

217. *See* David Gelertner, *A Religion of Special Effects*, N.Y. TIMES, Mar. 30, 1997, § 4, at 11 (ascribing the mass suicide by Heaven’s Gate cultists to suppression of traditional religion).

218. *See* MICHAEL WALZER, *THICK AND THIN: MORAL ARGUMENT AT HOME AND ABROAD* 2–19 (1994) (claiming that such a consensus not only exists in America but is universal).

219. “[T]he Confucian school of thought continued to exert great influence on Chinese life and on the social and political order down to the present century.” *Confucianism in THE CAMBRIDGE DICTIONARY OF PHILOSOPHY* 151, 152 (Robert Audi ed., 1995).

220. “Act so that you treat humanity, whether in your own person or in that of another, always as an end and never as a means only.” IMMANUEL KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS* 46 (Lewis White Beck trans., 2d ed. 1990); *see also* BASIL MITCHELL, *MORALITY: RELIGIOUS AND SECULAR: THE DILEMMA OF THE TRADITIONAL CONSCIENCE* 123–24 (1980) (stating that Judeo-Christian and Kantian ethics of justice are both based on the status of persons as ends, not means).

221. *See supra* note 61 and accompanying text.

222. In his Farewell Address, George Washington said: “Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason

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historic connection between religion and moral philosophy in the West and the tendency of much secular philosophy to treat morality as just a matter of personal taste.²²³

D. Summation

The disdain for religion that long dominated Western thought is receding, due in part to changes in Western religions. Most sects now accept science, reason, capitalism, individual freedom (including free exercise and disestablishment of religion), democracy, romantic love, and equality of the sexes. Support for these ideals is often stronger in religious rather than secularist thought. Faith in secularism dwindled after the failures of science, psychiatry, socialism, and liberal individualism to confirm optimism about human nature and achieve human happiness. These failures show the need for a moral and spiritual dimension to human existence. In theory, secular philosophies can fill this need, but in the West, and especially in America, religion has always been the principal source of moral and spiritual values.

Secular doctrine bars religion from public discourse because it is not based on fact and reason. But public discourse inevitably raises normative questions that cannot be answered by fact and reason, so religious norms cannot be excluded from debate while secular morals are admitted. America's Constitution and traditions forbid government to affirm the truth of religious claims. With the decline of secularism, however, neither is it appropriate for government to be hostile to religion.

III. SECULARISM, THE SUPREME COURT AND THE CONSTITUTION

A. Secularism in the Supreme Court: Past and Present

Legal scholars have chronicled the secularist tilt of the Supreme Court that began in the 1960s,²²⁴ but they have ignored

and experience both forbid us to expect that national morality can prevail in exclusion of religious principle." George Washington, *Farewell Address* (Sept. 17, 1796), in ARLIN M. ADAMS & CHARLES J. EMMERICH, *A NATION DEDICATED TO RELIGIOUS LIBERTY: THE CONSTITUTIONAL HERITAGE OF THE RELIGION CLAUSES* 114 (1990) (citing I J. RICHARDSON, *A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1908*, at 64 (1908)).

223. See MITCHELL, *supra* note 220, at 31-32.

224. See Steven D. Smith, *Separation and the "Secular": Reconstructing the*

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its philosophical underpinnings. They have also overlooked the subsequent demise of secularism and revival of religion and their significance to constitutional law. This section discusses the rise and current status of secularism in the Supreme Court and then considers how renewed respect for religion in society should influence constitutional adjudication.

Despite the dominance of secularism among intellectuals, most Americans remained religious.²²⁵ Until the 1960s, America's state institutions respected religion. Most public schools began the day with a prayer. Religious institutions, like sectarian hospitals, received government aid²²⁶ and many parochial schools and their students received government services (such as bus transportation) or aid (such as books and supplies).²²⁷ Religion figured prominently in public discourse, and religiously-inspired values were never considered unacceptable bases for legislation.

Starting in the 1960s, however, the Supreme Court halted many customary practices, like public school prayer and most aid to parochial schools,²²⁸ invoking Jefferson's metaphor of separation of church and state.²²⁹ Most Americans endorsed

Disestablishment Decision, 67 TEX. L. REV. 955 (1984) (describing the Supreme Court's secularism). The article first "suggests that in the late eighteenth century the choice between an integrated and segregated church-state structure was a genuine option and that the possibility of a wholly secular government and politics was not a live alternative. By the mid-twentieth century, however, the situation was reversed." *Id.* at 975.

225. See *supra* text accompanying note 80.

226. See *Bradfield v. Roberts*, 175 U.S. 291 (1899) (holding that appropriations paid to a hospital "managed by people who hold to the doctrines of the Roman Catholic Church" was not inconsistent with Article I of the Amendments to the Constitution that "congress shall make no law respecting an establishment of religion").

227. The Supreme Court's first decisions on aid to parochial education upheld government payment of the cost of transporting parochial school students, *Everson v. Board of Educ.*, 330 U.S. 1 (1947), and the lending of state-approved textbooks on secular subjects, *Board of Educ. v. Allen*, 392 U.S. 236 (1968).

228. See *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (striking down aid to religious schools); *Engel v. Vitale*, 370 U.S. 421 (1962) (forbidding organized school prayer).

229. See Thomas Jefferson, Letter to Messrs. Nehemiah Dodge, Ephraim Robbins, and Stephen S. Nelson, a Committee of the Danbury Baptist Association (Jan. 1, 1802), reprinted in *THE COMPLETE JEFFERSON* 518-19 (Saul K. Padover ed., 1943) ("I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between church and state.").

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that metaphor but never interpreted it as broadly as the Court then did.²³⁰ The Court treated the religion clauses differently because it saw religion differently. Some justices embraced the secularist view that religion is irrational and divisive and that religionists are eager to force their faith on others and to extract public subsidies.²³¹ In *Everson v. Board of Education*, the majority said:

The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy. . . . In efforts to force loyalty to whatever religious group happened to be on top and in league with the government of a particular time and place, men and women had been fined, cast in jail, cruelly tortured, and killed.²³²

Unfortunately, in deciding *Everson* the majority ignored the much greater atrocities committed by atheistic regimes earlier this century and continuing in the Soviet Union at the time, and it slighted the positive role of religion in American history. In later opinions, even some of the justices accused their colleagues of hostility to religion.²³³

The Court believed religious people are irrational, try to suppress the truth, and need to be enlightened with secular truth. Thus, the Court overturned a law barring the teaching of evolution in public schools.²³⁴ The court held that the state could not abstain from the debate over evolution but had to correct the lies propounded by religion. Because of its low opinion

230. See FREDERICK MARK GEDICKS, *THE RHETORIC OF CHURCH AND STATE: A CRITICAL ANALYSIS OF RELIGION CLAUSE JURISPRUDENCE* 3 (1995) ("While the majority of Americans support the general principle of separation of church and state, most strongly disagree with the strictness and vigor with which the Supreme Court has located and policed the boundary.").

231. See Stephen Pepper, *Taking the Free Exercise Clause Seriously*, 1986 BYU L. REV. 299, 306-07 (stating that secularism dominates "western intellectual, political and legal thought").

232. *Everson*, 330 U.S. at 8-9.

233. See *County of Allegheny v. ACLU*, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring in part and dissenting in part) (stating that the majority "view of the Establishment Clause reflects an unjustified hostility toward religion, a hostility inconsistent with our history and our precedents"); *Wallace v. Jaffree*, 472 U.S. 38, 85 (1985) (Burger, C.J., dissenting) (claiming that the majority opinion "manifests not neutrality but hostility toward religion").

234. See *Epperson v. Arkansas*, 393 U.S. 97, 109 (1968).

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of religion, the Court also granted it little protection. Religious objections to compliance with a law can be overridden by any rational, secular state purpose.²³⁵

The secularist justices also sought to banish religion from public life and exile it to the private sphere,²³⁶ insisting that every law have a “secular legislative purpose.”²³⁷ Because most moral principles widely-held in America stem from religion, however, there is no clear, objective basis for distinguishing secular from religious purposes. In practice, the Court treats as secular (and thus permissible) those purposes endorsed by the secularist elite. By this standard, laws forbidding polygamy, incest, sexual harassment, and drug use are valid even though these practices are tolerated in many other societies and their disapproval in the West is rooted in religious beliefs. A law forbidding the teaching of evolution, however, is declared to lack a secular purpose and struck down because it does not conform to secularist opinion. Laws against abortion, homosexual sodomy, and same-sex marriage are often attacked and may someday be struck down on this ground.²³⁸

Although secularism deems religion divisive, the Court’s campaign to purge religion from public life exacerbated rather than curtailed social conflict. Public funding of education is a less contentious issue in countries such as the Netherlands, which subsidizes parochial schools, than in America, where courts forbid most aid. Here, most of the contention is over

235. See *Employment Div. v. Smith*, 494 U.S. 872 (1990). Phillip Johnson notes one apparent exception to the rule: “[P]olitical liberals [including several justices] tend to be indulgent towards harmless individuals and small groups who have quaint beliefs, while being intensely suspicious of ‘organized religion’—meaning groups like the Catholic Church and evangelical Protestants, who might challenge the liberal hegemony.” Phillip E. Johnson, *Afterword*, 2 NEXUS 169, 171 (1997).

236. See GEDICKS, *supra* note 230, at 12 (explaining that those justices espoused the secular notion that “considers religion to be an irrational and regressive antisocial force that must be strictly confined to private life”); Gerard v. Bradley, Comment, *Dogmatomachy—A Privatization Theory of the Religion Clause Cases*, 30 ST. LOUIS U. L.J. 275, 277 (1986) (“[P]rivatization is the court’s ‘final solution’ to the problem of religious friction.”).

237. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

238. The authority of judges with religious beliefs to rule has even been questioned. See *Feminist Women’s Health Ctr. v. Codispoti*, 69 F.3d 399, 400 (9th Cir. 1995) (denying plaintiff’s petition for recusal of Catholic judge despite plaintiff’s assertion that the judge’s “fervently-held religious beliefs would compromise [his] ability to apply the law”); *Idaho v. Freeman*, 478 F. Supp. 33 (D. Idaho 1979) (seeking recusal of judge because he was a Mormon).

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public aid to elementary and secondary schools; far less strife accompanies public aid to colleges, despite the extension of such aid to private (including religious) schools.

Secularism is attractive to the Supreme Court because it buttresses all secular power, especially the judicial power. Throughout history, including Biblical times, the late Roman Empire, and the Middle Ages, temporal rulers have tried to expand their own power by curbing the political influence of religion and the priesthood. The incentive for such an effort is stronger yet in the judiciary because its function of enforcing broad ethical principles in society is much like functions performed by the church. Indeed, it is often been noted how judicial robes and courtroom rituals resemble priestly garb and religious rites.

Nonetheless, secularism hardly touched the Court until the Warren Court arrogated to itself the power to impose its own morals on society. The Court's edicts on abortion and the death penalty, for example, were challenged because they not only contradicted the intentions of the Framers but also clashed with the moral beliefs of most Americans, beliefs grounded in religion. To parry this challenge, the Court adopted the secularist tenet that religion is a strictly private matter. In this view, religious beliefs are barred from public discourse²³⁹ and, therefore, cannot be invoked to contest the legitimacy of the Court's self-declared authority to resolve moral issues.

Put another way, so long as the Court tried to follow the Framers' understanding of the Constitution, issues of separation of church and state arose only under the religion clauses of the First Amendment. When the Warren Court sought to impose its own moral values on the nation through the Due Process Clause of the Fourteenth Amendment, it encountered the existing moral code based largely on religion. Secularism supplied the means to destroy this obstacle—religious beliefs were ejected from public debate and relegated to private lives. This left the public square empty of any competitors to the justices' own morals.

The secularist fire on the Supreme Court of the 1960s and 1970s has now subsided but not disappeared, and no coherent

239. *See supra* text accompanying note 12.

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doctrine has replaced it. Its opinions are hopelessly confused:²⁴⁰ some condone blatant government promotion of religion²⁴¹ while others strike down innocuous activities that treat religion neutrally or relieve religious minorities of some unusual burden.²⁴² By all accounts, the Court needs a new approach.

B. The Future: The Significance of the Decline of Secularism and the Revival of Religion

The Supreme Court should replace its secularist hostility to religion with a respect consistent with current social circumstances and understanding. Two general principles should guide this change. First, moral values underlie all government action (or inaction), and reason alone cannot generate values, so there is no basis for privileging secular over religious sources of values; government action cannot be invalid simply because it stems from religious values. Second, religious institutions should be eligible to participate in public activities on the same footing as other private organizations. These tenets require new attitudes in the Court about specific issues and, indeed, about basic principles of constitutional adjudication.

1. Sources of constitutional interpretation

The first question of constitutional law is where judges should seek standards for constitutional decision making. All the major theories of constitutional adjudication can include religion. One school interprets the Constitution according to the intentions of the Framers.²⁴³ The Framers were influenced by their religious beliefs, so this approach necessitates consideration of those beliefs. Another school would add to original intent the conventional morality of the American people, who

240. See GEDICKS, *supra* note 230, at 1–7 (summarizing the many complaints about the Court's doctrinal incoherence).

241. See, e.g., *Marsh v. Chambers*, 463 U.S. 783 (1983) (permitting organized prayer at legislative sessions).

242. See *supra* text accompanying note 234; *infra* text accompanying notes 258, 292.

243. See ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990). “The philosophy of original understanding” required a judge “to apply the Constitution according to the principles of those who ratified the document.” *Id.* at 143.

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are also deeply influenced by religion.²⁴⁴ A third school exhorts judges to decide cases according to their own principles,²⁴⁵ including their beliefs about religion. Even a committed atheist must resort to some comprehensive notion of right and wrong.²⁴⁶

Though each school can entail religious beliefs, secularism today bars religion from public discourse, so religious considerations must be hidden. This causes confusion and distortion because opinions do not accurately communicate their underpinnings.²⁴⁷ It would be better to openly discuss the relevant religious and nonreligious sources of values—whether of the Framers, the American people generally, or the justices themselves—in defining such constitutional concepts as equal protection, life, and liberty. For instance, though the Framers and conventional American morality condone execution, many people consider the death penalty unconstitutional. If the opposing sides of the debate identified the sources of their moral values, others (justices, scholars, lower court judges trying to follow precedent, and the public) could better understand and evaluate their opinions.

Religion also influences attitudes toward authority in adjudication. Deconstructionism brings radical subjectivism to hermeneutics—it deems no interpretation of a text authorita-

244. See Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's 'Moral Reading' of the Constitution*, 65 *FORDHAM L. REV.* 1269, 1286 (1997) (advocating constitutional interpretation according to longstanding but evolving public mores); Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 *YALE L.J.* 221, 284 (1973) (advocating a standard of “conventional morality”); see generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 63–69 (1980) (describing but criticizing such standards).

245. See DWORKIN, *supra* note 59, at 17 (explaining that a judge should decide cases according to “some principle that strikes him as capturing . . . the moral rights of the parties”). But see ELY, *supra* note 244, at 44 & n.7 (describing but criticizing such attitudes).

246. See KENT GREENAWALT, *PRIVATE CONSCIENCES AND PUBLIC REASONS* 145 (1995) (“[A] model of decision must include some reference to what is right (or what a judge believes is right) as a matter of moral and political philosophy, independent of the legal materials.”); see also RONALD DWORKIN, *LAW'S EMPIRE* 90 (1986) (“Any practical legal argument . . . assumes the kind of abstract foundation jurisprudence offers. . . . So any judge's opinion is itself a piece of legal philosophy, even when the philosophy is hidden . . .”).

247. See Stephen L. Carter, *The Religiously Devout Judge*, 64 *NOTRE DAME L. REV.* 932 (1989) (criticizing theories of adjudication that treat a judge's religious convictions differently from secular moral beliefs).

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tive or objectively better than any other.²⁴⁸ Literary theorist George Steiner argues that the secular weapons of fact and reason cannot defeat this view. A competing theory must “draw upon . . . a theology or, at the least . . . a transcendent metaphysics.”²⁴⁹ The last phrase means that respect for authority—whether of the Framers or of the nation’s traditions—can build upon a secular philosophy as well as religion. Without such a foundation, however, reliance on precedent becomes unnecessary, even impossible; a judge need not, and perhaps cannot, resort to anything but his own preferences in interpreting the law.

2. *The meaning of religious neutrality*

The Supreme Court and commentators generally agree that the First Amendment requires government neutrality toward religion,²⁵⁰ but neutrality is vague; it means different things to different people.²⁵¹ To secularists it means that religion is a private matter, excluded from public discourse and receipt of any public funds. Critics realize that this attitude is not neutral but hostile to religion: there is no neutral, nonreligious position on anything.²⁵² Neutrality requires that likes be treated alike. The problem, then, is to decide what religion is like. Secularism considers religion unique and pernicious. If that characterization is valid, privatization may be genuinely neutral; it treats religion as a kind of bad habit that government does not encourage but also does not hinder so long as it is kept out of public.

This view of religion is no longer defensible. Religion is no more harmful (or less beneficial) than secular creeds. The Constitution forbids government to favor or affirm, or (absent compelling interest) to disfavor or condemn, any one religion, or

248. See *supra* note 107.

249. GEORGE STEINER, *NO PASSION SPENT: ESSAYS 1978–1995*, at 38 (1996).

250. See JOHN E. NOWAK ET AL., *CONSTITUTIONAL LAW* 1031 (3d ed. 1986) (“The general guide here is the concept of ‘neutrality.’”).

251. See Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990) (discussing several possible meanings of religious neutrality).

252. See STEVEN D. SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM* 84–88 (1995); GEDICKS, *supra* note 230, at 31–32, 56–61.

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religion generally, even though government may favor or disfavor or affirm or condemn secular norms. Thus religion must be treated differently from secular creeds, but it need not, and should not, be privatized. Rather, neutrality should mean that religion may participate in public discourse on the same basis as secular creeds, and religious organizations may receive government benefits on the same basis as nonsectarian organizations.

The remainder of this Article discusses the implications of this attitude for certain issues under the religion clauses.

3. *Public education*

Nowhere is the role of religion as controversial as in public education. The Supreme Court's decisions here are inconsistent but generally forbid aid to parochial schools. In public schools, moments of silence, positive references to religion and any religious influence on the curriculum are forbidden. These decisions echo the secularist creed that public schools should teach fact and reason, not religion; that religion is a private matter; that religion is uniquely divisive; and that because religious institutions (including parochial schools) are hostile to science, reason, democracy, equality of the sexes, and freedom of thought and are destructive of emotional well-being, parochial schools should receive no public funds.

These beliefs, now discredited, still haunt the Court. Parochial school graduates are as committed to democracy as public school graduates.²⁵³ Parochial schools generally teach secular subjects better than public schools.²⁵⁴ They do not exacerbate racial strife; many are more racially integrated and educate minorities better than public schools.²⁵⁵ Parochial schools cannot

253. See ANDREW M. GREELEY & PETER H. ROSSI, *THE EDUCATION OF CATHOLIC AMERICANS* 114-36 (1966) (showing that parochial and public school graduates do not differ in their political attitudes).

254. See DONALD A. ERICKSON, *PRIVATE SCHOOLS IN CONTEMPORARY PERSPECTIVE* 31 (1983); 2 *COMPARING PUBLIC AND PRIVATE SCHOOLS: SCHOOL ACHIEVEMENT* (Edward H. Haertel et al. eds., 1987) (summarizing studies comparing achievement in public and private schools); Eugenia Froedge Toma, *Public Funding and Private Schooling Across Countries*, 39 J.L. & ECON. 121, 122, 145 (1996) (discussing private and public school performance studies).

255. See CARTER, *supra* note 79, at 195-96 (citing studies showing that parochial schools are equally or better integrated than public schools and educate the poor better by providing a "substitute family"); Derek A. Neal, *The Effect of Catholic Sec-*

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be rejected for being morally partisan because all education, public or private, teaches moral values.²⁵⁶ Given America's commitment to religious freedom, parochial schools in general should be treated equally with nonsectarian schools. A religious school should be disfavored only for a compelling reason—that is, that it breeds conduct antagonistic to American traditions.²⁵⁷ Otherwise, there should be no constitutional objection to giving equal aid to parochial and public school students.

The Supreme Court invalidated a law requiring a moment of silence in public schools because the legislature intended it to facilitate voluntary prayer.²⁵⁸ This decision, too, evinces the secularist view that public schools should teach facts and reason; prayer violates this standard, so it should not be condoned in public schools. The Court's banishment of religion from public schools has a profound impact: "A secular school does not necessarily produce atheists, but it produces young adults who inevitably think of religion as extraneous to the real world of intellectual inquiry, if they think of religion at all."²⁵⁹

A decent regard for religion would recognize that people need, and most people want, a spiritual dimension in their lives and that it is appropriate and desirable for public schools to recognize this need and to accommodate, if not nurture, the spiritual dimension. This recognition can take many forms. Social studies, art, and the humanities should cover the past and present role of the spirit, including religion, in people's lives, and how this affects society, including government. Moral traditions and moral questions should be discussed. It is also appropriate to allow a moment of silence for spiritual thoughts and to recognize that for many this will mean prayer.

Due in part to the Court's secularist tilt, public schools are often hostile to religion.²⁶⁰ Fortunately, this hostility is not cate

ondary Schooling on Educational Attainment, 15 J. LAB. ECON. 98, 117–22 (1997) (stating that Catholic schools greatly improve educational attainment among urban minorities).

256. Schools can teach values by omission. If schools exclude morals or religion, they imply that these things are unimportant.

257. For example, colleges that condone racial discrimination can be denied tax exempt status. *See* *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

258. *See* *Wallace v. Jaffree*, 472 U.S. 38, 47–49 (1985).

259. Michael W. McConnell, "God Is Dead and We Have Killed Him!": *Freedom of Religion in the Post-Modern Age*, 1993 BYU L. REV. 163, 181.

260. *See* Michael W. McConnell, *The Selective Funding Problem: Abortion and*

gorical. For instance, the Court does not forbid teaching the Constitution even though many constitutional provisions (like the prohibition of slavery)²⁶¹ were motivated by religion. Decisions like the evolution cases cannot be distinguished simply because they entail science. Most scientists believe there are some inherent cognitive differences between the sexes, yet the Court would never strike down a law forbidding public schools to teach this. The Court should recognize that value judgments inevitably shape education. Public schools cannot endorse any religion, but instruction should not be unconstitutional simply because it stems from religious rather than secular values.

In *Stone v. Graham*, the Court forbade posting the Ten Commandments in public schools.²⁶² Whether such actions establish religion depends heavily on context. In *Stone*, it was unclear whether children thought the school was endorsing the religious message of the Ten Commandments or merely displaying a document that has inspired Western and Near Eastern civilizations. If the latter is true, the display should be permitted. It is entirely proper for public schools to teach that moral and spiritual norms are important and, in our culture, often spring from religion.

Not all Supreme Court decisions disfavor religion. The Court properly upheld a law requiring public schools that accommodate extracurricular student groups to grant equal access to student religious groups.²⁶³ Public schools should treat spiritual and ethical concerns as seriously as sports, music, and other extracurricular interests and treat religious groups pursuing these concerns equally with secular groups.

4. *Public discourse*

Secularism disapproves of religion in public discourse and lawmaking. As Ronald Dworkin says, "the Constitution does not allow states to justify policy on grounds of religious doctrine."²⁶⁴ The Supreme Court followed this principle, forbid-

Religious Schools, 104 HARV. L. REV. 989, 1012-13 n.75 (1991) (citing studies finding such hostility).

261. See U.S. CONST. amend. XIII.

262. 449 U.S. 39, 42-43 (1980).

263. See *Board of Educ. v. Mergens*, 496 U.S. 226 (1990).

264. Ronald Dworkin, *The Right to Death*, N.Y. REV. BOOKS, Jan. 31, 1991, at 14, 17; see also Laurence H. Tribe, *Foreword: Toward a Model of Roles in the Due*

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ding laws that have a religious purpose even if they do not promote religion.²⁶⁵ Decisions on moments of silence and teaching of evolution in public schools apply this principle.²⁶⁶

A less disdainful attitude prevailed in *Rosenberger v. Rec-tors and Visitors of the University of Virginia*,²⁶⁷ albeit only by a 5-4 vote. The university there funded several student journals but refused one journal because it examined public issues from a religious perspective. The university's defense that the establishment clause barred funding was not supported by the views of the Framers or of the American public; it merely expressed the secularist desire to exclude religion from public discourse. The Court not only rejected this defense but properly held that the free speech clause forbade the university to discriminate against a journal because of its religious perspective.²⁶⁸ Although the majority did not say so, all policies must stem from norms that transcend fact and reason, and religion has inspired most major debates in our history.²⁶⁹ There is no valid ground for discriminating against religion in public debate.²⁷⁰

Unfortunately, hostility to religion flared up again in *Romer v. Evans*.²⁷¹ Voters amended the Colorado constitution to overturn state and local laws barring discrimination against homosexuals and precluding future adoption of such laws. The vote reflected both secular objections to homosexuality²⁷² and the tenet of many religions, including traditional Christianity, Judaism, and Islam, that homosexual conduct is immoral.

Process of Life and Law, 87 HARV. L. REV. 1, 23 (1973) (stating that there is impermissible entanglement of religion and government "whenever the views of organized religious groups have come to play a pervasive role in an entire subject's legislative consideration for reasons intrinsic to the subject matter as then understood").

265. See *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (ruling that a law must have both a secular purpose and a secular effect).

266. See *supra* text accompanying notes 234, 258.

267. 515 U.S. 819 (1995).

268. See *id.* at 836-37.

269. See *supra* note 120 and accompanying text.

270. The Court notes that "[i]f any manifestation of beliefs in first principles disqualifies the writing, . . . it is indeed difficult to name renowned thinkers whose writing would be accepted, save perhaps for articles disclaiming all connection to their ultimate philosophy." *Rosenberger*, 515 U.S. at 837.

271. 517 U.S. 620 (1996).

272. Many social scientists consider homosexuality detrimental to the traditional family. See GEORGE GILDER, *MEN AND MARRIAGE* 69, 76-78 (1986).

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The Court's majority condemned the amendment as "inexplicable by anything but animus toward" homosexuals²⁷³ and "a bare . . . desire to harm" them.²⁷⁴ As for "the liberties of [those] who have personal or religious objections to homosexuality," the majority said "[t]he breadth of the Amendment is so far removed from these particular justifications that we find it impossible to credit them."²⁷⁵ That is, the majority considered the states argument based on "respect for other citizens' freedom of association"²⁷⁶ a rationale so absurd that its proponents must be either liars or too stupid to see that the amendment bore no "rational relationship" to their purpose.²⁷⁷ The majority's hostility to religion must run deep, for the Court almost never rejects laws under the rational basis test.²⁷⁸ The insult to religion did not escape notice. As one major organization noted, the opinion "[i]n effect . . . called more than 800,000 Coloradans 'hate-filled bigots.'"²⁷⁹ Even secularists should worry when America's millions of traditional religionists feel scorned by the Supreme Court.

5. *Social welfare programs*

Government often pays private entities to implement social programs. Can religious organizations legally perform this role? In *Bowen v. Kendrick*,²⁸⁰ the Supreme Court upheld the Adolescent Family Life Act (AFLA), which funds both religious and secular associations to advise teenagers about sex and pregnancy. The court held that AFLA funds could not be "used

273. *Romer*, 517 U.S. at 632; see also *id.* at 634 (describing the amendment as "born of an animosity toward" homosexuals).

274. *Id.* at 634-35 (quoting *Department of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

275. *Id.* at 635. The majority did not indicate how the amendment was too broad or what narrower provision might be upheld.

276. *Id.*

277. *Id.* Similar religious insults were hurled by a federal district judge against a similar law adopted by voters in Cincinnati. See *Equality Found. v. Cincinnati*, 860 F. Supp. 417, 443-44 (S.D. Ohio 1994), *rev'd, vacated, and remanded* 54 F.3d 261 (6th Cir. 1995), *vacated and remanded*, 518 U.S. 1001 (1996).

278. See NOWAK ET AL., *supra* note 250, at 358 (noting that a rational basis standard affords "great latitude" for and a "strong presumption for validity of" laws reviewed thereunder).

279. *Tyranny in Robes*, WASH. WATCH, June 21, 1996, at 1 (Family Research Council, Washington, D.C.).

280. 487 U.S. 589 (1988).

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by the grantees in such a way as to advance religion.”²⁸¹ *Bowen* is an uncertain precedent because it was a five to four decision and it never defined “used . . . to advance religion.”²⁸² Evidently, counseling by clergy in clerical garb and in religious buildings is permitted. However, the Court proscribed “specifically religious activit[ies]”²⁸³ and “materials that have an explicitly religious content or are designed to inculcate the views of a particular religious faith.”²⁸⁴ It also said programs are prohibited unless “only a small portion of [the grantees], if any, could be considered ‘pervasively sectarian.’”²⁸⁵

The dissent unwittingly exposed the problem with these limitations when it said “AFLA requires teaching and counseling ‘on matters inseparable from religious dogma.’”²⁸⁶ The word “dogma” reveals the minority’s secularist attitude that religion rests on prejudice, not reason. The statement is correct, however—unless restrained by force or morality, it is natural for teenagers to have sex and babies. Government can preach secular principles to discourage teenage sex and pregnancy, but Western sexual morality is traditionally tied to religion; most secular philosophies condone all consensual sex. Sexual morality is, as the *Bowen* minority says, “inseparable from religious dogma.”²⁸⁷ Thus, to be effective the AFLA program probably has to include religion.²⁸⁸

This does not mean government can foist religion on the unwilling. Participation in AFLA programs is optional and offers no direct, tangible rewards. At least in large cities,

281. *Id.* at 615.

282. *Id.*

283. *Id.* at 621.

284. *Id.*

285. *Id.* at 611 (quoting *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 385 (1985)).

286. *Id.* at 639 n.9 (Blackmun, J., dissenting) (quoting the district court opinion, 657 F. Supp. 1547, 1565 (D.D.C. 1987)).

287. *Id.*

288. Many faith-based sex education courses have succeeded in reducing teenage illegitimacy rates. See Fagan, *supra* note 90, at 13 nn.72–78. Other faith-based programs are also “especially good at insulating children from the temptations of drugs and crime.” John J. DiIulio, Jr., *Stop Crime Where it Starts*, N.Y. TIMES, July 31, 1996, at A15 (“Churches and synagogues seem to be better at the welfare-state business than the welfare state itself.”); see also David Brooks, *God and the Neocons*, PUB. INTEREST, Winter 1997, at 95, 100; Joe Klein, *In God They Trust*, NEW YORKER, June 16, 1997, at 40 (describing success of and controversy over faith-based social programs).

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government can fund secular as well as religious grantees so that clients can choose between the two. Religious grantees can be required to obtain clients' consent before discussing religion and to omit theology that is irrelevant to the program. But the Court should not try to segregate religion and morality because in our society the two are, as the *Bowen* minority said, "inseparable."²⁸⁹

At least one court has accepted this reasoning.²⁹⁰ Some states allow courts to order offenders with alcohol or drug problems to enroll in treatment programs as a condition to probation or parole.²⁹¹ Some offenders have successfully challenged these laws under the Establishment Clause because the available programs (like Alcoholics Anonymous) have a significant religious content.²⁹² However, one federal court has held that such programs are valid if the offender is given a choice between a secular and a religious rehabilitation program.²⁹³

The limited evidence suggests that church involvement can also make other social welfare programs more effective. One county in Michigan has had some success in making welfare recipients more independent through a voluntary program of referrals to local churches that help the recipients.²⁹⁴

6. *Accommodation of religion*

Secularists generally oppose any legal concession to religion—religion is irrational, so it deserves no special treatment. The faithful who must choose between obeying the law and observing their faith merit no more sympathy than any other citizens who dislike a particular law. Accommodations are also divisive—any concession granted to one sect will trigger demands for special treatment from others. To grant all such

289. *Bowen*, 487 U.S. at 639 n.9 (Blackmun, J., dissenting).

290. See *Board of Educ. v. Grumet*, 512 U.S. 687, 707 (1994) (citing *Wolman v. Walter*, 433 U.S. 229, 247-48 (1976)).

291. See, e.g., N.Y. PENAL LAW § 65.10(2)(e) (McKinney 1998).

292. Cases upholding such challenges include *Warner v. Orange County Dep't of Probation*, 968 F. Supp. 917 (S.D.N.Y. 1997) and *Griffin v. Coughlin*, 673 N.E.2d 98 (N.Y. 1996).

293. See *O'Connor v. California*, 855 F. Supp. 303 (C.D. Cal. 1994).

294. See Joe Frolik, *County Changes Approach to Welfare*, CLEV. PLAIN DEALER, Sept. 28, 1997, at 1A (describing the experience of Ottawa County, Michigan).

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demands would undermine effective government. To deny only some demands, however, would permit religious majorities to extract special treatment through their greater influence while denying it to minorities, which is unfair and generates resentment that undermines domestic peace. Thus, to avoid conflict, all religious accommodations should be denied.

Not surprisingly, then, secularists on the Supreme Court wield both the Free Exercise²⁹⁵ and Establishment Clauses to attack accommodations of religion. This hostility to accommodation leads to decisions that would be laughable but for the pain they inflict on injured sects. In *Board of Education v. Grumet*²⁹⁶ the Court struck down a law creating a separate school district for a community composed primarily of Satmar Hasidic Jews because the law applied only to this community. No other community had requested such a law, but the Court simply assumed the state would not be evenhanded. The Satmar sought the law because their dress and manners are distinctive and their handicapped children were mocked and scared in local public schools.²⁹⁷ They were no majority seizing privileges at the expense of others—the Satmar are an unpopular minority of the Hasidim, who are an unpopular minority of Orthodox Jews, who are an unpopular minority of American Jews. The idea that the New York legislature was establishing Satmar Hasidism as the state's official or preferred religion is ludicrous, yet the Court rejected a law that spared the Satmar an unusual burden.

Secularism can accept religion only by placing it in some broader category that secularism does respect and then treating religion like other things in that category.²⁹⁸ Thus secularists condone accommodation of religion when it fits under the heading of freedom of conscience or freedom of speech. Occasionally the Court distorts the meaning of a law in order to twist a religious accommodation into something acceptable to secularism. Thus the statutory exemption from the military draft for those who object to military service based on “religious training and

295. See *infra* text accompanying notes 303–07.

296. 512 U.S. 687 (1994).

297. *Id.* at 691–92.

298. See GEDICKS, *supra* note 230, at 111 (pointing out that “exemptions from the unintended burdens of generally applicable laws can be consistently defended by secular individualist discourse only if they are not defined in terms of religion”).

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belief” was construed by the Court to extend to those whose objections are based on any sincere belief.²⁹⁹

A more respectful view would treat religion as a valued part of our heritage which government may accommodate, though not prefer. Protecting religious minorities honors America’s commitment to freedom and to caring for all citizens without pressuring them to ape the majority. The survival of religious minorities testifies to the continuing importance of the spiritual in the modern world. That government takes care not to harm them should be applauded and not condemned as unconstitutional.

7. *Celebration of our cultural heritage*

The Supreme Court has also resorted to tortured line-drawing and convoluted reasoning over government displays with religious elements.³⁰⁰ These cases reflect the secularist tenet that religion is divisive and properly relegated to the private sphere and therefore should not be honored by government as secular elements of our culture often are. Ironically, public museums exhibit religious art and celebrate religious holidays without inciting protest, even though these activities are often more poignant than the tacky displays of plastic Santas and elves that so agitate secularists.³⁰¹ This paradox again reflects secularism’s acceptance of religion when it can be recast as something else. Thus religious paintings are permitted in public buildings when they can be characterized as art. However, a painting of Jesus may not hang in the entry of a public school.³⁰² A more logical attitude would reason that public schools display pictures of many important people; that Jesus has been extraordinarily important in Western history;

299. *Welsh v. United States*, 398 U.S. 333, 336, 339 (1970).

300. *See County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (permitting display of Chanukah menorah and Christmas tree but forbidding Christmas crèche); *Lynch v. Donnelly*, 465 U.S. 668, 685 (1984) (permitting Christmas display, including a crèche, because “the city has not impermissibly advanced religion, and that including the crèche does not create excessive entanglement between religion and government”).

301. The Christmas display in the Metropolitan Museum of Art in New York City is set in a large gallery of medieval religious works. At its center is a large Christmas tree with a Neapolitan nativity scene of hundreds of elegantly carved figures. An audio system plays religious Christmas music.

302. *See Washegesic v. Bloomingdale Pub. Sch.*, 33 F.3d 679 (6th Cir. 1994).

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and therefore it is permissible to exhibit a picture of Jesus so long as it is not done in a way that endorses his divinity.

It is desirable for government to celebrate our cultural traditions. To do so is *authentic* multiculturalism; it fosters a sense of community that combats alienation and promotes respect for others.³⁰³ Religion is an integral part of our heritage which government may honor so long as it endorses no particular faith. Whether an endorsement is conveyed depends on context. Religious art in public museums, for example, should pass muster unless a museum routinely favors one religion without regard to the artistic or historic importance of its art. The same should be true of public holiday displays and public school holiday programs.

8. *Free exercise*

The Free Exercise Clause has suffered double abuse. Secularist judges constrict free exercise because they scorn religion; conservative judges do so, too, because they read all individual rights narrowly.³⁰⁴ The most significant exception is *Wisconsin v. Yoder*, where the Court excused from compulsory schooling Amish children whose religion condemns formal schooling beyond the eighth grade.³⁰⁵ In *Employment Division v. Smith*, however, the Court truncated free exercise, holding that it does not exempt a person from “a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).”³⁰⁶

303. See RICHARD BERNSTEIN, *DICTATORSHIP OF VIRTUE: MULTICULTURALISM AND THE BATTLE FOR AMERICA'S FUTURE* 7–11 (1994) (arguing that true multiculturalism promotes learning about other cultures rather than concentrating on one's own cultural group).

304. See, e.g., *Frazee v. Illinois Dep't of Employment Sec.*, 489 U.S. 827 (1989); *Thomas v. Review Bd.*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963). These cases forbid denial of unemployment compensation to workers who quit jobs for religious reasons. The decisions reflect a desire to expand entitlements more than a respect for religion. The Court has also forbidden laws that are not generally applicable but blatantly gerrymandered to discriminate against a disfavored sect. See *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993).

305. 406 U.S. 205 (1972).

306. 494 U.S. 872, 879 (1990) (Stevens, J., concurring) (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982)).

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The Court's view is unpersuasive even under the standard of original intent. As John Garvey has recently argued, the Framers adopted the Free Exercise Clause because they considered religion uniquely important and valuable.³⁰⁷ The demise of secularism and the revival of religion confirm the Framers' wisdom. Accordingly, religion deserves greater respect than do secular enthusiasms.

Moreover, in the last two centuries government has changed in ways that increase the importance of religious freedom. As government grows and rules proliferate, conflicts between law and religion multiply. Respect for religion demands that religious objections be taken seriously. However, respect for religion stems in part from recognizing the social importance of morality, which also compels a countervailing respect for community standards of morality which can restrict individual freedom. Balancing these competing values is sometimes easy. For example, some parents have religious objections to their children being taught theories of evolution. Since knowledge of evolution is important in very few jobs, the Free Exercise Clause should exempt these children from public school classes teaching these theories.³⁰⁸

Other cases are tougher. The Supreme Court has upheld laws against polygamy.³⁰⁹ Polygamy inflicts no direct, conventional harm on anyone, is condoned by most religions except mainstream Christianity, and has been common in non-Western cultures. Nonetheless, monogamy is an important Western norm. Weighing the social interests in monogamy is not easy. A religious exemption from a law may be defended as harmless when few people are likely to invoke it, as would undoubtedly be true for anti-polygamy laws. However, the hortatory role of law can be undermined by exceptions, even if few people take them. This is especially true of ideals (like marital commitment) that are hard to sustain in the modern world. Further, if one exemption is granted, others are harder to deny. For example, creating a religious exception for polygamy would

307. See JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? 49-57 (1996).

308. See George W. Dent, Jr., *Religious Children, Secular Schools*, 61 S. CAL. L. REV. 863, 923-27 (1988) (arguing that public school children should generally be excused from classes that offend their religion).

309. See *Reynolds v. United States*, 98 U.S. 145 (1878).

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make it harder to deny legal recognition of homosexual partnerships as marriages. Similarly difficult are questions about how compelling is the state's interest in denying religious exemptions from anti-discrimination laws.³¹⁰

In sum, proper regard for religion demands that free exercise claims be taken seriously, but will not necessarily produce a wholesale expansion of legal religious exemptions.

9. *Beyond the religion clauses*

Attitudes toward religion also affect constitutional doctrine in areas outside the religion clauses.³¹¹ For society to flourish, government cannot be neutral on moral issues, as secularists often advocate,³¹² but must promote certain norms beyond the minimal injunction not to harm others.³¹³ Indeed, the law has always done so, albeit often tacitly. Most taxes, antidiscrimination laws, and requirements that parents care for their children do not simply prevent harm to others but turn moral duties into legal obligations. Government spending outside the basic military and police functions necessary to protect citizens from direct harm—on education and health and tax benefits for charity, for example—are not morally neutral but favor certain norms.

The problems of secularism are also obvious in issues like assisted suicide. If the individual is the sole judge of what is in her own best interests, it is hard to see how the state can

310. Some of these laws (like those against racial discrimination) may be more socially important than others (like laws against discrimination based on marital status). Compare *Thomas v. Anchorage Equal Rights Comm'n*, 165 F.3d 692 (9th Cir. 1999), with *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska 1994), cert. denied, 115 S. Ct. 460 (1994) and *Smith v. Fair Employment and Hous. Comm'n*, 913 P.2d 909 (Cal. 1996) (both denying religious exemptions from similar laws).

311. See, e.g., *supra* text accompanying notes 271–279 (discussing *Romer v. Evans*).

312. See *supra* note 59.

313. Even while praising government neutrality about conduct that does not harm others, liberal secularists often advocate nonneutral state action. For instance, liberals generally support criminal laws, taxes, subsidies, and education to promote “safe” sex, feminism, care for the poor, certain art works (even if they offend some religious groups), and secular (public) schools (as opposed to religious schools). More liberals now expressly acknowledge the norm-creating function of law. See Sunstein, *supra* note 175, at 913 (“[G]overnment . . . cannot avoid affecting social norms.”). And many, like John Rawls, eschew the term “neutrality” as either “misleading” or “impracticable.” JOHN RAWLS, *POLITICAL LIBERALISM* 191 (1993).

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impose any limits on assisted suicide³¹⁴ or, for that matter, even try to discourage teenage suicide. In order to restrict or discourage suicide the state must be able to act on a norm that, at least in general, life is desirable. Like any norm, this one can be generated by secular philosophy, but in the West the main source of this norm has been religion. If religion is excluded, discourse about public policy on suicide collapses into farce.

Debate, often rancorous, about which morals to promote and how to do so is inevitable, but the Supreme Court should not limit the legislation of morality absent a specific basis in American constitutional tradition to do so. That religion often influences the moral consensus should not vitiate a law. Consideration of how this principle should affect the Court must be taken up another time.

IV. CONCLUSION

For two centuries religion was widely disparaged by Western intellectuals. In the 1960s disdain for religion triumphed in the Supreme Court, which proceeded to transmogrify the religion clauses of the First Amendment. Because of changes in the main Western religions and problems with secularist theories, intellectual respect for religion has revived. The Supreme Court's secularist majority has passed on, but its ghost still haunts; the Court has not yet fashioned a new, coherent treatment of religion but has careened through inconsistent decisions and incoherent opinions.

Legal scholars have noted this state of affairs but have not explained how it came to pass. This Article has analyzed the Court's attitude toward religion in light of the history of secularism. From this perspective it becomes possible to understand why the Court became antagonistic to religion; it also becomes clear why this antagonism can no longer be justified. This Article has begun the inevitably long, difficult task of considering how renewed esteem for religion should guide the Court.

314. Even Oregon's assisted suicide law—the most permissive in the nation—allows assisted suicide only in very limited circumstances. *See* Death With Dignity Act, OR. REV. STAT. § 127.870 (1997).